81-17

No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

DAVID R. HARRIS, Superintendent, Green Haven Correctional Facility,

Petitioner,

against

JOSE RIVERA, a/k/a ARAMIS FERNANDEZ,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Questions Presented

1. Where a state prisoner and a co-defendant waived their right to a jury trial in state court and were jointly tried, is a claim that verdicts convicting the state prisoner and acquitting the co-defendant are inconsistent sufficient to set forth the denial of a constitutional right so as to be cognizable in a federal habeas corpus proceeding?

2. Did the court below err in holding that facially inconsistent verdicts as to two defendants rendered after a state court non-jury trial denied the convicted defendant due process of law in the absence of written findings explaining the apparent inconsistency and demonstrating the validity of the conviction?

3. May a federal court upon habeas corpus review require a state court, sitting as trier of fact in a multi-defendant criminal trial, to explain its verdicts in written findings, not required from juries and not heretofore required from state or federal judges as a Constitutional standard?

4. Did the court below fail to note significant differences in the conduct of the defendants and thereby err in finding facial inconsistency between the verdicts in the case at bar?

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, the Superintendent of a New York State Correctional Facility, respectfully requests that a writ of *certiorari* issue to review the judgment of the United States Court of Appeals for the Second Circuit in *Jose Rivera a/k/a Aramis Fernandez* v. *David R. Harris.* Entry of judgment was stayed pending determination of petitioner's timely-filed petition for rehearing with suggestion for a rehearing *en banc.* The petition was denied on April 21, 1981, and petitioner's subsequent motion to stay the mandate pending determination of a petition for a writ of *certiorari* was denied on May 12, 1981.

Petitioner's application for a stay of the judgment of the United States Court of Appeals, entered June 3, 1981, pending a final disposition of this matter is submitted herewith.

Citations to Opinions Below

The District Court opinion has not yet been reported and is reproduced as Appendix A to this petition. The Court of Appeals opinion, reported at 643 F. 2d 86, is reproduced as Appendix B.

Jurisdiction

The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

Statement of the Case

In the present habeas corpus proceeding respondent Jose Rivera challenges a judgment of the Supreme Court of the State of New York, New York County, rendered on May 12, 1975 convicting him of the crimes of robbery in the second degree and burglary in the third degree. He is presently incarcerated at Mid-Orange Correctional Facility.

Rivera, his wife Cynthia Humdy, and a friend Earl Robinson were charged with robbery in the first and second degrees, grand larceny in the third degree, burglary in the second degree and possession of a weapon. The defendants waived their right to a jury trial and were tried jointly before the Honorable James J. Leff.

At the trial Milagros Torres testified that Rivera, Humdy and Robinson forced their way into her apartment and robbed her at gunpoint. Torres testified that while eating breakfast on the morning of March 26, 1973 Humdy tricked her into opening her door by pretending to be a nurse "investigating something about vaccination." Rivera then forced his way into the apartment with a pistol, breaking the door chain with Robinson's help. Rivera

dragged Torres into the bedroom where Robinson handcuffed her and placed tape over her mouth.

This description of the defendants' entry into the apartment was not corroborated by any further evidence and was contradicted by the testimony of Earl Robinson, who stated that Torres was in the numbers business and that he and the co-defendants had gone to her apartment because Rivera stated he had won a policy bet and not because they intended to rob her.

Torres repeatedly testified that she was not a numbers operator. However, she was unable to explain the discrepancy between her life style and her meager income. Torres testified that for eleven years she had been a manicurist and was a night supervisor at a laundry earning between $75 and $95 per week at the time of the robbery. Yet she also stated that she had vacationed abroad for three weeks each year, that she owned a new car, and that she had installed a wall safe in her apartment to protect her valuables. Additionally, the trial court took judicial notice of the fact that $540, the sum found in defendant Humdy's coat pocket as she attempted to flee, equals the net return on a one-dollar numbers bet.

Torres' assertion that she was robbed, however, was supported by circumstantial evidence and the testimony of disinterested witnesses. On the morning in question Robert Parrilla, a neighbor, heard a woman scream and heard a man threaten to kill someone. When Parrilla discovered that the peep-hole on his door had been blocked, he telephoned the police. When the police arrived a woman talking from inside the apartment identified herself first as Torres and said that everything was fine. Both Parrilla and Erminda Gonzalez, Torres' friend, however, recognized that the voice was not Torres'. The woman inside next identified herself as Torres' friend. The police officers demanded that the door be opened.

Parilla, having returned to his next-door apartment, found Cynthia Humdy on the fire escape connecting the two apartments. Taking Humdy into custody, the police found $540 in cash in her coat pocket. At this time Robinson opened the door to Torres' apartment, and he and Rivera came out. No weapons were found on either.

The police found Torres' apartment in a shambles, with furniture overturned and various objects strewn about the floor. The victim appeared upset and frightened. She was crying and had a red mark on her face. The police did not search the apartment, but found jewelry and cash collected in the bathtub. The victim told them she had not put it there. The police also found a fully loaded and operable pistol on the living room floor and two pairs of handcuffs and a key on the bed. The police did not notice the condition of the outside door.

As the three intruders were being led out of the building, Parrilla and Gonzalez heard Rivera warn Torres not to talk if she knew what was good for her. The officers heard Rivera say that he had come to collect $1000 that Torres owed on a bet, but heard nothing about a $540 policy bet.

While neither Rivera nor Humdy took the stand, Earl Robinson testified, presenting a strikingly different version of events. Robinson had been an officer in the merchant marine since 1959. After returning from a voyage in December, 1972, he worked for various steamship companies while waiting to ship out again. On the morning of March 26, 1973 Rivera and Humdy offered to give Robinson a ride to the Maritime Union hall, but requested that Robinson accompany them to pick up the proceeds on a numbers bet.

Torres invited the three into her apartment. Instructing Robinson and Humdy to have a seat in the living room, Torres went into the kitchen with Rivera, where the two argued loudly for a half hour over whether respondent

had a hit. When the police arrived Torres told them she was undressed and ran to the bathroom, placing jewelry and cash in the tub and flushing numbers slips down the toilet. Torres then pushed the three into the bedroom and ordered Robinson and Humdy to climb out the window onto the fire escape. Robinson told Humdy not to listen, but she climbed out. Instead of following, Robinson opened the door. In the hall he found the police with their guns drawn. After they were taken out of the building Rivera explained to the officers that Torres was in the numbers business and that he had been at her apartment to collect his winnings on a policy bet.

The court found respondent Jose Rivera and his wife Cynthia Humdy guilty of robbery in the second degree, grand larceny in the third degree and burglary in the third degree.* Defendant Robinson was acquitted on all charges. Rivera was sentenced to two concurrent terms of imprisonment of five to fifteen years and seven years to be served consecutively with a previously imposed five-year federal sentence. The judgment of conviction was unanimously affirmed without opinion by the Appellate Division, First Department, on April 28, 1977, and on May 26, 1977 the New York Court of Appeals denied leave to appeal.

In his application for a writ of habeas corpus Rivera alleged in part that he was impermissibly convicted while a co-defendant was acquitted. The District Court (*Werker*, J.) denied the petition and further denied Rivera's motion for a certificate of probable cause to appeal. The motion was renewed in the Second Circuit, which issued the certificate.

The court below ruled that there was ample evidence in the record to support the trial court's finding that Rivera was guilty beyond a reasonable doubt. The court, how-

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* Rivera and Humdy were found not guilty of first degree robbery, possession of a weapon and second degree burglary. The grand larceny convictions were dismissed at sentencing as lesser included counts of second degree robbery.

ever, held the verdicts of the state trial court convicting respondent while finding that his co-defendant had not been proven guilty to be facially inconsistent. In its concededly unprecedented decision, 643 F.2d at 91, 94, 96, the court concluded that under such circumstances the Due Process Clause of the Fourteenth Amendment places the burden upon the state trial court to satisfy the federal habeas corpus court that the conviction rests upon a rational basis.

Summary of the Argument

The decision is of the exceptional importance to warrant review by this Court. First, the holding is contrary to repeated rulings by this Court that consistency among the verdicts rendered at the conclusion of a criminal trial is not required. However, both the rule enunciated by this Court and the narrow exception governing bench trials recognized in the Second but not other Circuits are grounded not in the Constitution, but in the supervisory powers of the federal appellate courts. Thus the court below erred in requiring the state trial court to make written findings explaining its reasoning to the satisfaction of the federal habeas corpus court. In so holding, the decision below marks a significant departure from the decisions of this Court governing the limited scope of habeas corpus review.

Second, even in their direct review of federal convictions, at least two circuits have explicitly rejected the Second Circuit's consistency requirement. Accordingly, even if the question of whether consistency is required in verdicts rendered after bench trials is one of constitutional dimension, this Court should resolve this question, answered differently by the courts of appeals.

Moreover, the holding below goes beyond what has been required even by the one prior circuit court ruling requiring a degree of consistency among non-jury verdicts in the

exercise of that court's supervisory powers. Unless reversed, the decision imposes a new and stricter standard applicable upon collateral review of state court convictions, as there was no inevitable inconsistency between the conviction of Rivera and the acquittal of a co-defendant.

In reaching its decision the Second Circuit made several fundamental errors in interpreting the verdicts and findings of the state court. It was only these errors and not any mistakes by the trial judge which led the court to hold that the finding that the co-defendant was not proven guilty beyond a reasonable doubt was facially inconsistent with the verdict that Rivera was guilty of lesser charges. Thus, even should the decision below stand and the trial court be required to explain its judgment to the federal courts, respondent will nevertheless ultimately be denied habeas corpus relief. Under such circumstances, however, petitioner would be denied the opportunity to seek review of the unprecedented ruling below.

REASON FOR GRANTING THE WRIT

1. The decision below, in giving a constitutional dimension to consistency in non-jury verdicts by a state court as between co-defendants, marks a significant departure from prior decisions of this Court, conflicts with other circuits and utilizes habeas corpus jurisdiction to expand the review of state court convictions into a new area.

This Court has long recognized that the federal habeas corpus court cannot engage in broad appellate review of state court decisions, but rather canvasses only claims of fundamental constitutional error. *Donnelly* v. *DeChristoforo*, 416 U.S. 637, 642 (1974); *Milton* v. *Wainwright*, 407 U.S. 371, 377 (1972). The federal appellate courts' own views as to better practice expressed in the exercise of their supervisory powers over the federal trial courts are irrelevant in habeas corpus review of state court convic-

tions. *Cupp* v. *Naughten*, 414 U.S. 141, 146, 149 (1973). See *McNabb* v. *United States*, 318 U.S. 322, 340 (1943).

In *Dunn* v. *United States*, 284 U.S. 390 (1932), this Court ruled that in federal criminal prosecutions inconsistent verdicts are not invalid. Accord, *Hamling* v. *United States*, 418 U.S. 87, 101 (1974). In *United States* v. *Maybury*, 274 F. 2d 899 (2d Cir. 1960), the only case cited by the court below in which a conviction was reversed for inconsistency, the Second Circuit, by a divided vote and over a vigorous dissent by Judge Learned Hand, held that the *Dunn* rule repeatedly enunciated by the Supreme Court does not govern inconsistent bench trial verdicts. At least two other circuits have ruled that there is *no* requirement that bench trial verdicts be consistent. *United States* v. *West*, 549 F. 2d 454 (8th Cir.), *cert. denied*, 430 U.S. 956 (1977); *McElheny* v. *United States*, 146 F. 2d 932 (9th Cir. 1944). Thus, apart from the question of whether the issue is one of constitutional dimension, given the conflicting decisions among the circuits concerning the applicability of the *Dunn* rule to non-jury verdicts, the question should be resolved by this Court.

While finding a constitutional issue of due process to be present in the matter of inconsistent verdicts, the court below conceded that its decision in *Maybury* did not purport to rest upon constitutional grounds "and well may have been decided solely in the exercise of the court's supervisory power" over federal courts. 643 F. 2d at 94.*

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* Some state courts have explicitly held that the *Maybury* rule is not of constitutional dimension and have declined to follow it. *People* v. *Pugh*, 36 A D 2d 845, 846 (2d Dept.), *aff'd*, 29 N Y 2d 909 (1971); *cert. denied*, 406 U.S. 921 (1972); *Commonwealth* v. *Harris*, 239 Pa. Super. 603 (1976). Other courts have simply held that consistency among bench trial verdicts is not required. *Copening* v. *United States*, 353 A. 2d 305, 313 (D.C. App. 1976); *Flowers* v. *State*, 221 Ind. 448 (1943); *Commonwealth* v. *Reed*, 458 Pa. 8 (1974); *People* v. *Caruso*, 176 Cal. App. 2d 272 (1959), *cert. denied*, 363 U.S. 819 (1960); *DeMott* v. *Notey*, 4 Misc. 2d 996 (Sup. Ct. Nassau Co. 1956), *rev'd on other grounds*, 3 N Y 2d 116 (1957).

However sound the rule enunciated in *United States* v. *Maybury, supra,* may be from the viewpoint of judicial practice, the rule is not guaranteed by the Constitution, which assures the right to trial by jury. The Constitution does not, nor could it logically, create a *quid pro quo* for the waiver of the right to jury trial in the form of "extra" due process rights that are only sometimes necessary to permit a fundamentally fair trial. Surely the Constitution provides no such incentive, which necessarily would serve to coerce jury trial waivers by many criminal defendants.

The court below found the evidence to be constitutionally sufficient to support a finding of guilt beyond a reasonable doubt. 643 F. 2d at 90 n. 2. This Court in *Jackson* v. *Virginia,* 443 U.S. 307, 319 n. 13 (1979), carefully stated that under such circumstances the reasoning process actually used by the fact finder, even if it is known, is not relevant to the habeas corpus court's inquiry. In comparing the disposition of the charges against the defendants in the present case the court below, however, engaged in precisely the unwarranted intrusion upon the discretion of the fact finder deemed inappropriate by this Court in *Jackson.*

Aside from being inappropriate, such inquiry is not fruitful. Courts have recognized that the determination that evidence is sufficient to prove all elements of a crime simply denotes the existence of reasonable doubt. It does not establish assured facts that must be relied upon in disposing of other charges. See *United States* v. *Zambardi,* 276 F. 2d 169, 170 (2d Cir.) *cert. denied,* 364 U.S. 842 (1960); *DeMott* v. *Notey, supra.*

One result of requiring consistency could be more all-or-nothing verdicts. *People* v. *Dercole,* 74 A D 2d 318, 329-330 (2d Dept. 1980). In cases where the evidence is close, fewer acquittals would be expected. *Ibid.* Thus while enunciating a constitutional right it concedes to be previously unrecognized, the court below risks diluting the constitutionally guaranteed right not to be convicted unless proven guilty beyond a reasonable doubt.

2. The court below erred in finding facial inconsistency among the verdicts and in holding such inconsistency to require reversal of a state judgment of conviction under the Due Process Clause of the Fourteenth Amendment.

Even if the constitution requires consistency among bench trial verdicts, the decision below warrants review by this Court. The court below erred both in finding the verdicts of the trial court to be facially inconsistent and in holding facial inconsistency to mandate reversal as a matter of due process.

While purporting to follow its previously enunciated rule that non-jury verdicts will not be reversed on direct federal appeals unless "wholly irreconcilable with any rational theory," *United States* v. *Wilson*, 342 F. 2d 43, 45 (2d Cir. 1965), the court below actually imposed a new and stricter standard in this habeas corpus proceeding. There was no inevitable inconsistency between the conviction of Rivera and the acquittal of Robinson.* Thus the holding below—that the state trial court must make written findings explaining its reasoning to the satisfaction of the federal habeas corpus court—constitutes an unprecedented and unwarranted intrusion in the state's administration of its criminal justice system.

In *United States* v. *Maybury, supra,* the only case cited by the court below in which a non-jury conviction was vacated for inconsistency by a federal court, there was only one defendant. He was charged with forging and uttering a check with knowledge that it was forged. Since the only evidence that he knew the check to be forged was testimony that he had forged the endorsement himself, the acquittal on the forgery charge was necessarily incompatible

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* That this is the case was implicitly conceded by the court below when it sought more specific findings from the trial judge.

with proof of all elements of the uttering charge on which the defendant was convicted, and the court reversed on the uttering charge.

United States v. *Wilson, supra,* is more closely analogous to the present case. Three co-defendants were charged with stealing and conspiring to steal a package in interstate commerce. One witness testified that while one defendant, Wilson, picked up and then abandoned the package whose theft was charged, the witness further testified that the two co-defendants assisted. Additionally, there was evidence that during questioning Wilson provided the authorities with certain inaccurate information. *Id.,* 342 F. 2d at 44. While his co-defendants were acquitted on all charges, Wilson was convicted on the substantive charge. Declining to apply the *Maybury* rule, the court sustained the conviction although it stated it was not easy to understand how the trial judge arrived at the varying conclusions, concluding:

> Still the result is not wholly irreconcilable with any rational theory, as was the case in *Maybury,* where the judgments could be explained only on the basis of compromise. As to all three defendants the evidence was close to the line of sufficiency . . . [the trial court may] have found reasonable doubt overcome as to Wilson . . . While we adhere to the *Maybury* principle, it should not be extended to include cases where it is merely difficult to find a truly satisfying explanation for the differing conclusions. [*United States* v. *Wilson, supra,* at 43].

In the case at bar, viewing the evidence from the perspective of the trial court, which had the opportunity to observe all the witnesses, the verdicts, far from being irrational, logically followed from a perceptive analysis of the evidence. The Second Circuit made several fundamental errors in interpreting the verdicts and findings of the state court. It was only these errors, not any mistake by the

trial judge, which led the court below to hold that the finding that co-defendant Robinson was not proven guilty beyond a reasonable doubt was inconsistent with the verdict that Rivera was guilty of lesser charges.

The court below incorrectly assumed that to convict Rivera and Humdy the trial court must have accepted Torres' testimony in its entirety, and to acquit Robinson the trial court must have accepted all of his testimony, which attempted to exculpate Rivera and Humdy and was inconsistent with much of Torres' story. 643 F. 2d at 93. Proceeding from this faulty premise, the court below reached the conclusion that the verdicts seem self-contradictory. The trial court, however, appears to have taken an entirely different and sensible approach.

The trial court need not have credited Torres' self-serving denial that she was a numbers operator. Indeed, that court appears to have credited little of Torres' testimony other than her assertion that she had been robbed. Only this portion of her version of events was supported by convincing circumstantial evidence and the testimony of disinterested witnesses, including two police officers. The trial court's apparent belief that Torres was a numbers operator is not inconsistent with its clear conclusion that she was robbed. To the contrary, given the illegality of her enterprise, she could be expected to be reluctant to contact the police, making her particularly vulnerable to crime. Moreover, given her involvement in the illegal activity, Torres would seem to have no motive to claim falsely that she had been the victim of a crime, needlessly subjecting herself to scrutiny by the authorities.

The trial court did not rely upon Torres' description of a forced entry into her apartment. She claimed that Robinson participated, but he was acquitted on all charges. Torres further claimed that in forcing his way into the apartment Rivera used a pistol, but all defendants were acquitted on the charge of possession of a weapon (Penal

Law § 265.05). Additionally, all defendants were acquitted on the charges of burglary in the second degree (P.L. § 140.25) and robbery in the first degree (P.L. § 160.15), which, given the testimony presented, necessarily would have entailed a finding that Rivera was armed. Finally, Torres' claim that her door was broken open was not supported by circumstantial evidence. The two experienced police officers who answered the call did not notice damage to the door chain, which Torres said had been broken by Robinson and Rivera when they forced their way in.

The trial court convicted Rivera and Humdy on lesser offenses only. To convict on the charge of burglary in the third degree (P.L. § 140.20) the trial court need only have found beyond a reasonable doubt that the two entered or remained in Torres' apartment with the intent to commit a crime. To convict on the charge of robbery in the second degree (P.L. § 160.10) it was sufficient for the trial court to have found that each, with the assistance of the other, used or threatened the immediate use of physical force to obtain the roll of cash Humdy had when she was caught fleeing. To convict on the charge of grand larceny in the third degree (P.L. § 155.30) the trial court need only have found that Rivera and Humdy took or otherwise obtained property valued in excess of $250 with the intent to deprive wrongfully.

The fact that the trial court probably believed that Torres was a numbers operator and did not credit the bulk of her testimony did not require the acquittal of Rivera and Humdy on these lesser offenses. The testimony of the disinterested witnesses and circumstantial evidence amply supports the trial court's finding that petitioner and Humdy committed these crimes, but does not establish that they forcibly entered or used firearms. In contrast, the only evidence of Robinson's guilt was Torres' rejected testimony. Moreover, notwithstanding the Second Circuit's assumption to the contrary, Robinson's testimony is only inconsistent with his own guilt.

Torres' next-door neighbor Robert Parrilla suspected foul play and summoned the police. The police officers testified that Torres' apartment was in a shambles, with furniture overturned, a variety of items strewn all over the floor, and valuables and cash collected in the bathtub. Torres appeared upset and frightened. She was crying and had a red mark on her face.

Both Parrilla and Torres' friend Erminda Gonzalez testified that when the police arrived a woman in the apartment pretended first to be Torres and later to be Torres' friend. The woman falsely stated that she was not dressed and could not open the door, but that everything in the apartment was fine. Aside from Torres, co-defendant Humdy was the only woman in the apartment. The police later found Humdy on the fire escape attempting to flee. She had a large roll of cash in her pocket.

After the police arrived, two witnesses heard Rivera warn Torres not to talk if she knew what was good for her. The arresting officers heard petitioner state that he had gone to the apartment to collect a $1,000 debt. This was inconsistent with the subsequently developed defense that Rivera had collected $540 on a policy bet.

Thus, subsequent to the arrival of the police, both Rivera and Humdy behaved in a manner evidencing their guilt. In contrast, Robinson's response to the arrival of the police was to open the door and let them into the apartment, hardly conduct inconsistent with innocence.*

Robinson had first-hand knowledge of his own state of mind and actions, but could only testify as to what Rivera

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* The Second Circuit failed to recognize significant differences in the conduct of the defendants. In its detailed summary of the testimony it noted only that Parrilla "overheard one of the men warn Torres not to talk . . ." without identifying which defendant made the inculpatory statement. 643 F. 2d at 88. Similarly, the court below observed that after the police arrived, "the door to Torres' apartment then opened", without attaching significance to who did the opening. 643 F. 2d at 88.

said to convince him to come to Torres' apartment. The trial court had the benefit of observing the demeanor and physical appearance of the witnesses. If, for instance, Robinson was large or strong it could have concluded that he unwittingly was brought to the apartment to intimidate Torres. Similarly, Robinson had no first-hand knowledge of Rivera's conduct during the thirty minutes Rivera and Torres were alone in the kitchen, arguing loudly.

In short, the trial court could have accepted much of Robinson's testimony based upon his own observations, but rejected the truth of what Rivera had told him. Surely, the trial court was not obligated to accept Robinson's attempt to exculpate his friend, based upon the self-serving hearsay statements of the latter. Thus, Robinson's testimony was inconsistent with his own guilt and with Torres' version of events, which, as indicated by the verdicts, the trial court largely rejected. The reliable portions of Robinson's testimony were not inconsistent with Rivera's guilt.

After rejecting much of Torres' testimony, the trial court was left with insufficient evidence to support a finding of guilt as to Robinson. Perhaps the Second Circuit's inability to reconcile the verdicts is based upon an implicit assumption that to acquit Robinson the trial court must have been convinced of his innocence. See 643 F. 2d at 93. The trial court's acquittal of Robinson, however, does not necessarily mean that it was convinced of his innocence, only that it concluded guilt was not proven beyond a reasonable doubt. See *United States* v. *Zambardi, supra* at 170, where the court, declining to apply the *Maybury* rule, held that an acquittal signifies nothing more than a finding of reasonable doubt, not an assured fact. See also *DeMott* v. *Notey, supra.*

In a case where the evidence is close, fine lines may be drawn. That the trial court chose to draw the lines where it did, far from suggesting a constitutional infirmity, demonstrates an intelligent and carefully consistent weighing

of the evidence as well as a true appreciation of the heavy burden that must be overcome by the prosecution to dispel the presumption of innocence. See *United States* v. *Zambardi, supra,* at 170. It is this most stringent burden that permits differing verdicts based upon what, to one not present at trial, may seem to be slight differences in evidence. In the present case it is only because the trial court steadfastly maintained the presumption of innocence, rendering verdicts of guilty only on those counts on which the presumption was overcome, that the court below suspected a constitutional infirmity. Thus the danger of needlessly expanding the limited *Maybury* rule holding is to undermine the right of those in Robinson's position not to be convicted unless found guilty beyond a reasonable doubt.

In this case, where the sole issue was one of credibility and where the trial court had the opportunity to observe the witnesses, an appellate court, particularly upon federal habeas corpus review of a state conviction, must be extremely circumspect and deferential. *Jackson* v. *Virginia, supra.* Instead, the court below inappropriately assumed the worst, notwithstanding the above-described sensible interpretation of the evidence and verdicts.

CONCLUSION

For the foregoing reasons this petition for a writ of *certiorari* should be granted.

Dated: New York, New York
July 1, 1981

Respectfully submitted,

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APPENDIX A

Opinion.

78 Civ. 349 (HFW)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOSE RIVERA, a/k/a ARAMIS FERNANDEZ,

Petitioner,

—against—

DAVID R. HARRIS, Superintendent Green Haven Correctional Facility,

Respondent.

APPEARANCES (See last page):

HENRY F. WERKER, D. J.

Pro se petitioner Jose Rivera a/k/a Aramis Fernandez, was convicted of the crimes of robbery in the second degree and burglary in the third degree after a non-jury trial in Supreme Court, New York County. He was sentenced for the robbery conviction to an indeterminate five to fifteen year prison term to run concurrently with an indeterminate zero to seven year sentence for the burglary conviction. The Appellate Division, First Department, affirmed the conviction without opinion on April 28, 1977, and leave to appeal to the New York Court of Appeals was denied on May 26, 1977. Petitioner, who is currently incarcerated at Green Haven Correctional Facility, seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254.

The threshold issue is whether petitioner has exhausted his state court remedies as required by § 2254(b)[1] and (c).[2] *See also Picard* v. *Connor*, 404 U.S. 270, 276 (1971). As to those claims raised here which were also presented to the state court on direct appeal, petitioner has satisfied the exhaustion requirement and is not required to invoke state

procedures for collateral attack. *Allen* v. *County Court, Ulster County,* No. 77-2059, slip op. at 545 (2d Cir. Nov. 29, 1977), *citing United States ex rel. Newsome* v. *Malcolm,* 492 F.2d 1166, 1169 & n.4 (2d Cir. 1974), *aff'd sub nom. Lefkowitz* v. *Newsome,* 420 U.S. 283 (1975). In addition to those claims, petitioner raises further grounds in support of his application. Although not perfectly clear, it appears that the state court on direct appeal was not presented with those new arguments as required by the exhaustion dictates of *Picard* v. *Connor, supra.* However, due to the unique factual situation surrounding petitioner's extraordinarily persistent yet unsuccessful attempts to have the additional arguments presented on his appeal to the Appellate Division, I will address the merits of his petition. Before doing so, however, a brief synopsis of the underlying facts (as alleged by petitioner and uncontested by the respondent) concerning petitioner's efforts in state court is in order.

After his conviction, petitioner moved for assignment of counsel to prosecute his appeal. By order of the Appellate Division the motion was granted on September 21, 1976. PX-9f[3]. On October 28, 1976, petitioner wrote to his appointed attorney, urging him to consult petitioner concerning any points to be raised or omitted in the appellate brief. In that letter petitioner also stated:

> I must make one point crystal clear. Under no circumstances would I be satisfied with your Law Firm's submitting a Brief in my behalf sight unseen, i.e. without previous consultation with me. Please, is that sufficiently clear Mr. O'Rourke?"

PX-10. Apparently there were communications between petitioner and his attorney, *see, e.g.,* PX-10a, and petitioner sent the attorney a *pro se* brief of points he wished raised on appeal. Upon learning of the attorney's intention to argue only two issues, petitioner wrote again to the attor-

ney on December 17, 1976, PX-10b, referring to the *pro se* brief of points which he considered "vital and crucial" to his appeal, and reiterating that he desired to read the final brief before its submission to the Appellate Division. A responding letter was sent to petitioner by his attorney on December 29, 1976. PX-10c. In that letter the attorney assured petitioner that "the points that you raised in your brief will certainly be presented to the Court. In fact, your entire brief will be submitted as supplement to my brief." After this assurance of presentation of the *pro se* brief to the court, the attorney continued that "the brief I am submitting in your behalf will be addressed to the legal errors and insufficiencies and nothing else." Petitioner responded by letter of January 5, 1977. Pg-10d. A further communication followed from the attorney on January 14, 1977. PX-10e. On January 30, 1977, petitioner, inquiring about obtaining a copy of the brief prepared by his attorney, wrote another letter stressing that he would not be satisfied with a brief containing fewer than all the issues he desired included on appeal, and requesting a copy of the attorney-prepared brief to enable him to see that any point considered by him to be relevant was not inadvertently omitted, and if it had been, then to enable him to timely "make the proper amendment and/or supplement" before the court's deadline for submission of appellate briefs. PX-10f. According to petitioner, the attorney filed a brief with the Appellate Division on January 17, 1977 and did not include the *pro se* brief along with it as promised. Petition at 8. Subsequently petitioner communicated with his attorney on March 8 (the letter is not submitted as an exhibit) and received a response on March 15, 1977. PX-10g. On April 16, 1977 the appeal was heard by the Appellate Division, petition at 8; on April 20, after learning that his *pro se* brief never reached the court as a supplement to the attorney-prepared brief of four points,

petitioner filed what he denominates as an affidavit-petition, PX-15, requesting the court to refrain from rendering a decision on his appeal until such time as he received permission to file his supplemental *pro se* brief. *See* PX-16. The clerk of the court forwarded petitioner's papers to his appointed attorney, PX-17, and on April 28, 1977 the conviction was affirmed. PX-18. Unaware of the affirmance, petitioner on April 29, 1977 filed a "notice of motion in support of affidavit-petition of April 20, 1977," renewing his April 20 application and asking that Mr. O'Rourke be relieved as his appointed attorney. O'Rourke subsequently applied for leave to appeal the affirmance of the conviction to the state Court of Appeals which was denied. Meanwhile, petitioner, apparently acting in a *pro se* capacity, filed a "notice of motion for reargument of appeal," PX-22, based upon issues raised in both the brief submitted by his attorney and in the *pro se* supplemental brief (which apparently was not filed with the court). On May 27 petitioner wrote to the clerk of the Appellate Division reminding him of the motion submitted by petitioner on April 29, and the reargument motion submitted on May 23, and chiding the clerk for sending O'Rourke the papers submitted with the April 20 affidavit-petition instead of transmitting them to the court. See PX-22a. On June 28, 1977, the motion to reargue the appeal was denied by the Appellate Division. PX-27.

It is evident from the above that petitioner exerted great effort to place all the arguments raised in the present proceeding before the Appellate Division. Although it appears that certain of those points were not presented on direct appeal (and I emphasize that it is most unclear whether on the reargument motion in the Appellate Division the issues in the *pro se* supplemental brief were finally presented or considered), in this situation I find that comity will not be offended if I exercise my discretion and address those arguments. Rather, under the facts outlined

above, it is the court's view that it is judicially economical and that

> the interests of New York will be better respected if this Court views petitioner's challenge as sufficient to warrant federal court consideration now, rather than precipitating a new round of collateral proceedings that will furnish business for three layers of the state court system before an inevitable return to the federal courts.

Ennis v. *LeFevre*, 560 F.2d 1072, 1077 (2d Cir. 1977) (Newman, J., concurring).

The Merits

The first argument presented in support of the issuance of a writ of habeas corpus is that the state violated the Interstate Agreement on Detainers Act (the "IAD"),[4] particularly Article IV(e) which provides that after a prisoner's transfer from the jurisdiction of confinement to the prosecuting jurisdiction:

> If trial is not had on any indictment, information or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment . . . such indictment, information or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

Section 2254(a) provides that a writ of habeas corpus may be sought by a petitioner "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." Petitioner's allegation that New York state authorities violated the IAD in his situation presents a violation of a state statute, N.Y. Crim. Proc. L. § 580.20 (McKinney 1971). However, because the

IAD is an interstate compact requiring congressional approval (which has been extended to states participating in interstate detainer compacts, 4 U.S.C. § 112(a), *see* 1970 U.S. Code Cong. & Ad. News 4864, 4866), several courts have concluded that "the IAD creates federal rights which may be raised in a petition for habeas corpus filed pursuant to 28 U.S.C. § 2254." *Williams* v. *Maryland*, 445 F.Supp. 1216, 1219 (D. Md. 1978), *citing Beebe* v. *Vaughn*, 430 F. Supp. 1220, 1222-23 (D. Del. 1977); *Stroble* v. *Egeler*, 408 F. Supp. 630, 633-34 (E.D. Mich. 1976), *remanded*, 547 F.2d 339 (6th Cir. 1977); *United States ex rel. Esola* v. *Groomes*, 520 F.2d 830, 840-42 (3d Cir. 1975) (Garth, J., concurring). Although this court is in accord that federal statutory rights are created by the IAD, this disposes only of the jurisdictional issue. The next question is whether, on the merits, petitioner is entitled to a writ based on the alleged violations. I hold that he is not.

Before addressing the facts as set forth by petitioner, a brief examination of the Supreme Court's decision in two actions arising in this circuit is in order. In *United States* v. *Mauro*, No. 76-1596, and *United States* v. *Ford*, No. 77-52, 46 U.S.L.W. 4491 (May 23, 1978) the Court reversed the Second Circuit's holding in *Mauro* and affirmed that in *Ford*. In so doing the Court resolved an issue receiving variant treatment among the circuits. That issue is whether the use of a federal writ of habeas corpus ad prosequendum by federal authorities to secure the presence of a state prisoner constitutes a detainer within the meaning of the IAD. The court concluded that although such a writ is not a detainer under the IAD, 46 U.S.L.W. at 4497, in situations where a federal detainer is first lodged against the prisoner by filing it with state authorities, and the writ is subsequently used to obtain the prisoner's attendance in federal court, the provisions of the IAD are triggered. 46 U.S.L.W. at 4494.

Although the instant situation involves the use of a *state* writ ad prosequendum to secure the presence of a prisoner from *federal* custody, this factual difference renders the Court's holdings in *Mauro* and *Ford* no less applicable.

According to petitioner, New York State authorities lodged a detainer against him on March 4, 1974 at the Federal House of Detention in New York where he was incarcerated as the result of an unrelated federal charge. Petitioner was twice produced, on July 24, 1974, and on September 13, 1974, for pre-trial proceedings in Supreme Court, New York County through that court's issuance of a writ of habeas corpus ad prosequendum.[5] Since the state trial was had on neither of these days before petitioner was returned to federal custody, he seeks a writ of habeas corpus for the state's violation of Article IV(e), which appears triggered here under the recent holdings in *Mauro* and *Ford*.

Throughout the numerous papers petitioner filed with this Court, there is nowhere an allegation that while in state custody on those days, he was at any point imprisoned, or even detained for more than several hours to attend the pre-trial state proceedings. To the contrary, at least as to the September 13 date, petitioner reveals that he was returned the same day to federal custody. Petition at 16. In *United States* v. *Chico*, 558 F.2d 1047 (2d Cir. 1977), the court held provisions of the IAD inapplicable when two defendants were brought from state prisons to federal court pursuant to writs ad prosequendum to attend a federal proceeding. They were returned to state custody after several hours without having been incarcerated during the period of federal custody. The court noted that such a brief federal custodial interlude, without imprisonment, did not interrupt defendants' rehabilitation at the state institutions, and thus Article IV(e) did not afford a basis for habeas corpus relief. 558 F.2d at 1049. In the present case petitioner

has alleged nothing to indicate that his situation was any different from that in *Chico*. Consequently, I find that he has not met his burden of proving a claim for federal habeas corpus relief, *see Wolfrath* v. *LaVallee*, No. 77-2085 (2d Cir. May 9, 1978), slip op. at 2973, and is not entitled to the requested relief for violations of Article IV(e).

Aside from the above, there is another violation of Article IV(e) asserted. On September 14, 1977, petitioner was transferred from the Federal House of Detention in New York City to the Federal Correctional Institution in Danbury, Connecticut to serve a five year sentence imposed on the federal offense. The assistant district attorney prosecuting the state court action requested, on September 20, 1974, that petitioner be delivered from federal authorities to state custody on December 10, 1974 for trial on the pending state indictment. In the interim, petitioner, aware of the detainer which New York had lodged against him, signed a request form on October 21, 1974 for transfer to New York state authorities for final disposition of the pending state indictment.[6] He was transferred to state custody on December 9, 1974. He appeared in state supreme court on December 11 and was returned to federal custody at Danbury on December 19 after the state court trial was adjourned to March 3, 1975 over his objection. Having been returned to federal custody without the state court trial occurring while petitioner was in state custody, he sought a writ of habeas corpus in the federal district court in Connecticut for violation of Article IV(e). That petition was dismissed without prejudice as moot since petitioner had been transferred from Danbury to another correctional institution beyond the jurisdiction of the Connecticut district court. See PX-1b. Meanwhile, he instituted an Article 78 proceeding under the New York CPLR for dismissal of the

state indictment with prejudice for violation of speedy trial rights and the IAD. PX-2. His application was denied as was a subsequent motion for leave to appeal submitted as PX-2d.

Petitioner now asserts the same IAD violation presented in the Connecticut federal action and in the New York Article 78 proceeding.

Article IV(e) "is intended to avoid disruptions in a prisoners rehabilitation occasioned by repeated transfers between jurisdictions, is thus for his benefit and is waivable." *United States* v. *Ford*, 550 F.2d 732, 742 (2d Cir. 1977), *aff'd*, 46 U.S.L.W. 4491 (May 23, 1978). An examination of the facts in this case indicates that on December 11, 1974 petitioner expressly requested that he be released from state custody and returned to federal authorities at Danbury before trial. By requesting such a transfer he waived his rights under Article IV(e).

A transcript of the hearing held in state court, RX-14, on the day in question reveals the following. Appearing before Justice James Leff, the Assistant District Attorney indicated that he was ready for trial. The petitioner also was prepared to proceed. However, the attorneys for petitioner's co-defendants were absent; one was engaged in another proceeding in a different court, and the other was ill. Consequently, Justice Leff adjourned the trial date to March 3, 1975. At that time petitioner expressed dissatisfaction at the adjournment, explained to the court that a detainer was lodged aginst him in Danbury, that such detainer prevented his participation in any work release programs, and that he was pursuing the study of sociology while imprisoned there. Following this the Court denied on the record a speedy trial motion and a motion for discovery and inspection submitted by petitioner. As the court was about to conclude the hearing, the following colloquy ensued:

> The Defendant (Rivera): Your Honor, I have a request to make of you.

The Court: Go ahead.

The Defendant (Rivera): This case gong (sic) to be adjourned to March the third. I would like it that you have my writ satisfied, that is the writ on which I was brought over here.

The Court: You go back to Danbury.

The Clerk: Is that where you are now?

The Defendant (Rivera): Yes.

The Court: We are not going to keep you here until March. You go back now.

The Defendant (Rivera): This way I want to keep on studying, your Honor.

The Court: We will draw that order.

RX-16. It is quite clear from the above that petitioner desired and specifically I asked to be returned to Danbury. He may not now obtain collateral relief by contending that the requested return to federal custody violated Article IV(e).

Aside from the above, petitioner cannot prevail for yet another reason. Section 2254 is a vehicle for habeas corpus relief only when the claimed error "is 'a fundamental defect which inherently results in a miscarriage of justice' and if it presents 'exceptional circumstances where the need for the remedy afforded by the writ of *habeas corpus* is apparent.'" *Losinno* v. *Henderson*, 420 F. Supp. 380, 384 (S.D.N.Y. 1976) (Weinfeld, J.), *citing Davis* v. *United States*, 417 U.S. 333, 346 (1974). In the present case I find that the asserted violations of the IAD were not "fundamental defect[s]" resulting in a "miscarriage of justice" which would entitle petitioner to the remedy of a writ. *See Williams* v. *Maryland*, 445 F. Supp. at 1220. This reasoning is consonant with the Second Circuit's opinion in *Edwards* v. *United States*, 564 F.2d 652 (2d Cir. 1977 (*per curiam*). In affirming the denial of a motion brought pursuant to 28 U.S.C. § 2255 to vacate conviction and sentence and to dismiss the indictment on grounds

that the petitioner's transfer from state to federal custody violated Article IV(e) of the IAD, the Second Circuit did so on a broader basis than that on which the district court had denied the motion. The district court denied the § 2255 motion because petitioner had pled guilty to the indictment, thereby admitting guilt and waiving all non-jurisdictional defects. The Second Circuit stated "we think it preferable to affirm on the broader basis that a claim based on a violation of IAD is not within 28 U.S.C. § 2255." 564 F.2d at 653. Noting that Congress included as a ground for relief under both §§ 2255 and 2254 violations of "laws of the United States," the court refused to read that basis of relief under § 2255 literally. The court stated

> since a literal reading would lead to the absurd conclusion that any non-harmless error in a federal criminal trial would provide grounds for collateral attack, the Supreme Court has provided a gloss that § 2255 relief is to be given in cases not involving constitutional errors or lack of jurisdiction only when the claimed error of law was a "fundamental defect which inherently results in a complete miscarriage of justice" and presents "exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent." *Hill* v. *United States*, 368 U.S. 424, 428, 82 S.Ct. 468, 471, 7 L.Ed.2d 417 (1962) (internal quotation marks omitted). This view has been recently reaffirmed, Davis v. United States, 417 U.S. 333, 346, 94 S. Ct. 2298, 41 L.Ed.2d 109 (1974); See *Stone* v. *Powell*, 428 U.S. 465, 477 n.10, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976).

Id. at 654. Since "§ 2255 was intended to mirror § 2254 in operative effect," *Davis* v. *United States*, 417 U.S. at 344, I adhere to the reasoning of the *Edwards* court and

find no basis in the present instance to issue a writ due to the asserted violations of the IAD.

Petitioner's next contention is that he was not afforded a preliminary hearing in state court and was therefore deprived of a state statutory right under the New York Crminal Procedure Law. Such denial, he asserts, deprives him of due process and equal protection guarantees. This claim is meritless. "The Federal Constitution does not secure to a state court defendant a right to a preliminary hearing." *Ramirez* v. *Arizona*, 437 F.2d 119, (9th Cir. 1971). *See also Ardister* v. *Hoopper*, 500 F.2d 229, 232 (5th Cir. 1974).

The next argument set forth is directed at the sufficiency of the evidence presented in petitioner's state court criminal trial. Such an allegation is beyond the scope of federal habeas corpus review and does not rise to the level of a constitutional infringement, *United States ex rel Nersesian* v. *Smith*, 418 F. Supp. 26, 27 (S.D.N.Y. 1976) unless "there was no proof whatever of the crime charged." *United States ex rel. Terry* v. *Henderson*, 462 F.2d 1125, 1131 (2d Cir. 1972). I have reviewed the trial transcript. Any allegation that the trial record is devoid of evidence must be rejected as are Petitioner's Points IV, VI, VII, and VIII which, when liberally read, are variations on the claim of insufficiency of the evidence. *See* Petition at 20-21 & PX-16.

Petitioner contends that the trial judge imposed an excessive sentence. A sentence within the permissible limits of the law is not subject to collateral attack by way of a writ of federal habeas corpus. *In Re Curtis'* Petition, 240 F. Supp. 475, 485 (E.D. Miss. 1965), *aff'd*, 362 F.2d 999 (8th Cir. 1966), *cert. denied*, 386 U.S. 914 (1967); *see United States ex rel Marcial* v. *Fay*, 267 F.2d 507 (2d Cir. 1959); *United States ex rel MacLaren* v. *Denno*, 173 F. Supp. 237, 242 (S.D.N.Y. 1959), *aff'd*, 272 F.2d 191 (2d Cir. 1959), *cert. denied*, 363 U.S. 814

(1960). Since the sentence imposed was within the statutory limit, it furnishes no basis for a writ of habeas corpus and will not be disturbed.

The next argument is that petitioner was denied due process and equal protection when he was not afforded transcripts of certain criminal proceedings in the state court. The facts as culled from petitioner's papers (respondent has failed to brief this issue) reveal a chain of events which in no way demonstrates a constitutional violation.

The court ordered petitioner to be furnished with a transcript of the trial minutes on April 6, 1976. PX-7f. On May 17, 1976 petitioner submitted to the Appellate Division a "notice of motion for an order granting bill of exceptions and/or for record of complete judgment roll." PX-8. The district attorney responded to this motion and its supplement, PX-8a, on June 4, 1976, PX-8b and June 18, 1976, PX-8c. On July 1, 1976, petitioner's motion was partially granted as to certain pre-trial proceedings, but as to portions of the trial transcript which petitioner alleged were omitted from the minutes on file, the motion was denied with leave to renew upon petitioner's indication of when such proceedings occurred. Further, the court's order provided that the denial of petitioner's motion was without prejudice to a later motion to resettle the record. PX-8d. Petitioner next moved to resettle the record on July 27, 1976, PX-8e, 8f, and the district attorney again responded. PX-9a. That application resulted in an order dated September 2, 1976 which denied the motion *"with leave to submit a renewed motion on a showing of the relevance of the proceedings referred to in the papers to the issues to be raised on appeal."* PX-9c (emphasis supplied). This order is the last piece of communication relevant to the transcript issue which petitioner has submitted to the court; petitioner does not

argue that after September 2, 1976 he ever attempted to comply with the court's directive of showing the relevance of the proceedings for which transcripts were requested to the issues to be raised on appeal. Therefore his claim of an unconstitutional denial of transcripts must fail.

In *Ennis* v. *Lefevre,* 560 F. 2d at 1074, the court noted that although the Constitution does not require state provisions for appeals of criminal convictions, when a state does provide for appellate review, there is a duty to assure indigent defendants adequate opportunity for fair presentation of claims on appeal. This duty includes supplying indigent appellants with transcripts which afford a sufficiently complete record to allow proper consideration of claims on appeal. *Id., citing Griffin* v. *Illinois,* 351 U.S. 12 (1956); *Draper* v. *Washington,* 372 U.S. 487 (1963). However, as the *Ennis* court also noted, a sufficiently complete record "does not exist in the abstract; rather, it exists in order to ensure that the accused will have an adequate opportunity to present specific, individual claims." 560 F.2d at 1075. In the instant situation, petitioner, having failed to show the relevance of requested transcripts to his "specific, individual claims" to be raised on appeal, does not state a meritorious claim of unconstitutional denial of transcripts by the state.

A further claim asserted in this application is ineffective assistance of counsel on both the trial and appellate levels in violation of petitioner's sixth amendment rights. The standard for successfully asserting a claim of ineffective assistance of counsel as a basis for habeas corpus relief in this Circuit "is rigorous, primarly because petitioners are more likely than not to equate their failure to escape conviction with their counsel's alleged incompetence, regardless of the evidence against them and other circumstances attendant upon a particular trial." *LiPuma* v. *Commissioner, Department of Corrections, State of New*

York, 560 F.2d 84, 90 (2d Cir.), *cert. denied*, 98 S. Ct. 189 (1977) (citation omitted). Thus "[r]elief may only be obtained when representation has been so woefully inadequate 'as to shock the conscience of the Court and make the proceedings a farce and mockery of justice.'" *United States* v. *Currier*, 405 F.2d 1039, 1043 (2d Cir.), *cert. denied*, 395 U.S. 914 (1969), *quoting United States* v. *Wight*, 176 F.2d 376, 379 (2d Cir. 1949), *cert. denied*, 338 U.S. 950 (1950). *See also United States ex rel. Marcelin* v. *Mancusi*, 462 F.2d 36, 45 (2d Cir. 1972), *cert. denied*, 410 U.S. 917 (1973).

With the above in mind, I now turn to the petition. Page four of PX-2 is petitioner's account of how Lawrence Goldman became associated with his pending criminal action during July of 1974 when petitioner was produced before Judge Roberts in state supreme court. At that time petitioner made it known to the court that it was his desire to represent himself. To use petitioner's own words "[a]fter some exchange of opinions it was determined by Honorable Judge Roberts, and with petitioner's acquiescence at the end, that an attorney from the Appellate Division was going to be appointed by the Court on [*sic*] an *advisory position only to assist petitioner.*" PX-2 at 4 (emphasis supplied). Petitioner then continues that Mr. Goldman "was appointed as co-counsel to try to assist this petitioner in his defense." *Id.* A further reading, *id.* at 4-5, reveals that in September of 1974 petitioner orally moved to dismiss the action for failure to prosecute in his "Pro Se representation conferred upon him already by the court." In light of the attorney's advisory status to petitioner as *pro se* litigant, petitioner's contention that the record "demonstrates a complete lack of any kind of pre-trial groundwork done by the court appointed lawyer" (referring to a lack of pre-trial motions), PX-16 at 32, does nothing to advance his sixth amendment claim.

I have also considered petitioner's complaints concerning Goldman's failure to object and request a mistrial when a witness who had encountered psychiatric problems ten years prior to the trial was permitted to testify. It is meritless. Additionally, petitioner complains of Goldman's former status as an assistant district attorney in New York County. Read liberally, his papers assert a potential conflict of interest, *i.e.*, that Goldman's former role as prosecutor may have prevented him from acting as an effective defense attorney. No "specific instance of prejudice" having been shown by petitioner, *LiPuma* v. *Commissioner, Department of Corrections, State of New York*, 560 F.2d at 92, *citing United States* v. *Carrigan*, 543 F.2d 1053, 1055 (2d Cir. 1976), that assertion is rejected as supportive of a claim of ineffective assistance of counsel. I have also considered the other claims raised, *see* PX-16, Point IV at 31-37, and find them meritless.

On appeal petitioner was initially represented by a court appointed attorney, *see* PX-5, but became dissatisfied with him and moved *pro se* to have the attorney relieved. After a denial of the motion, see PX-7c, petitioner moved to reargue, PX-7d, the motion to have the appointed attorney relieved was granted, and petitioner was designated a *pro se* appellant. PX-7f, 7g. Thereafter petitioner moved for assignment of counsel to prosecute his appeal and Thomas O'Rourke was appointed. *See* PX-9e, f. Petitioner presently asserts an ineffective assistance of counsel claim based upon O'Rourke's representation on the appeal. The gravamen of petitioner's claim is that O'Rourke never submitted the petitioner's *pro se* supplemental brief to the Appellate Division despite a promise to do. (The facts pertinent to this claim are outlined above under the exhaustion discussion.)

As was recently stated in *Ennis* v. *Lefevre*:

> There is certainly a right to appear *pro se*. *Faretta* v. *California*, 422 U.S. 806, 95 S. Ct. 2525, 45 L.Ed.2d

562 (1975), as well as a right to appointed counsel, *Gideon* v. *Wainwright,* 372 U.S. 335,, 83 S. Ct. 792, 9 L.Ed.2d 799 (1963). "Obviously, however, those rights cannot be both exercised at the same time." *United States* v. *Mitchell,* 137 F.2d 1006, 1010, *aff'd on rehearing,* 138 F.2d 831 (2d Cir. 1943), *cert. denied,* 321 U.S. 794, 64 S. Ct. 785, 88 L.Ed. 1083 (1944); *see United States* v. *Wolfish,* 525 F.2d 457, 462-63 & n.2 (2d Cir. 1975), *cert. denied,* 423 U.S. 1059, 96 S. Ct. 794, 46 L.Ed.2d 649 (1976).

560 F.2d at 1073 (footnote omitted). The fact that petitioner's attorney did not submit the *pro se* supplemental brief to the Appellate Division simply does not rise to the level of a violation of the sixth amendment right to effective assistance of counsel. Moreover, although petitioner's attorney clearly should not have represented that the *pro se* document would be submitted to the court along with the formal brief, the misrepresentation does not elevate the failure of submission to a constitutional dimension. I have considered petitioner's arguments in the *pro se* supplemental brief and have found all of them to be meritless. Such lack of merit may well be the reason why the attorney never presented the court with the document and chose instead to submit only the formal brief.

The next argument presented is that the clerk of the Appellate Division violated petitioner's rights as a *pro se* litigant under *Faretta* v. *California,* 422 U.S. 806 (1975) when, upon receipt of the supplemental *pro se* brief from petitioner, he did not file it with the court but instead forwarded it to petitioner's attorney of record who was prosecuting the appeal. Because petitioner was not a *pro se* appellant at the time in question, he has not suffered any violation of rights he perceives due him under *Faretta.*

The final claim is that petitioner was unconstitutionally denied a speedy trial under principles enunciated in *Barker*

v. *Wingo*, 407 U.S. 514 (1972). The indictment was filed on April 27, 1973; almost 23 months elapsed between that time and the trial date. Whether that 23 month hiatus between indictment and trial violated petitioner's sixth amendment right to a speedy trial depends on factors which include the "length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." *Id.* at 530. An application of each of these factors to petitioner's case reveals no constitutional infirmity which merits the issuance of a writ of habeas corpus.

A 23 month delay is not unreasonable *per se*. *See e.g.*, *United States* v. *Cyphers*, 556 F.2d 630, 636 (2d Cir.). *cert. denied*, 431 U.S. 972 (1977) (33 month delay); *United States* v. *Mejias*, 552 F.2d 435 (2d Cir. 1977) (20 month delay); *United States* v. *Goldman*, 439 F. Supp. 352 (S.D. N.Y. 1977) (29 month delay). Moreover, it appears that the reasons for the delay between indictment and trial were numerous and varied, and cannot be attributed solely to the prosecutor. At least one reason for the delay appears attributable to the petitioner himself. After petitioner absented himself several times from pre-trial proceedings in state supreme court, the judge was constrained to revoke his bail and issue a bench warrant for his arrest on or about June 6, 1973. The whereabouts of petitioner between that time and March 4, 1974 are nowhere mentioned in his papers. Instead, he merely asserts that as of the latter date, when he was in prison due to the federal charges, "the prosecutor knew the exact whereabouts of appellant," PX-16 at 26, and should have been ready for trial. Other reasons for the trial delay include a substitution of counsel for one of petitioner's co-defendants after a conflict of interest arose due to dual representation; the prosecution's difficulty in securing the presence of the complainant-witness who had to be transported from Puerto Rico to New York; the continued unavailabil-

ity of a co-defendant released on bail due to his travels as a merchant seaman; adjournments requested by co-defendants due to other actual court engagements of their counsel; and adjournments consented to by petitioner's co-defendants and the prosecutor, several of which apparently occurred in petitioner's absence on or about the time his presence was sought to be secured by the issuance of the bench warrant. And, after these various delays, the record reflects that the prosecution was ready to proceed with the trial on December 11, 1974 but was thwarted from doing so because of a lack of readiness on the part of petitioner's two co-defendants. RX-14.

It also appears from the record that petitioner himself was most tardy in initially asserting his right to a speedy trial. He first did so by attempting to interpose an oral motion on September 13, 1974 to dismiss the indictment for lack of speedy prosecution. RX-10. This occurred almost 17 months after indictment. The court did not rule on that oral motion but instructed petitioner to reduce it to writing and submit it to the court for a determination on the adjourned trial date of December 11, 1975. This was done, and the motion was denied at that time as well as on other subsequent dates when petitioner moved to dismiss.

The last factor to be considered under *Barker* v. *Wingo* is prejudice to petitioner resulting from the delay. Petitioner nowhere argues even the slightest resultant prejudice in his case from the pre-trial delay. In fact, the only discussion even approaching an argument of prejudice is not asserted in petitioner's papers, but is reflected in the record of the December 11, 1974 proceeding. *See* RX-14. There petitioner reminded the court that the state detainer filed against him resulted in maximum security and ineligibility for work release programs in federal prison. When quizzed by the judge as to whether he was prevented from doing anything related to the

state prosecution due to the pre-trial delay, petitioner responded that if the action were dismissed he would better know his status and become eligible for a work release program. It is clear from this response that petitioner did not contend that preparation of his defense case was impeded by the delay; to the extent that his response addressed any disruption in his prison program, such disruption was precipitated by the indictment and detainer filed against him rather than solely by any pre-trial delay. *See generally Glucksman* v. *Birns*, 398 F. Supp. 1343, 1349-50 (S.D.N.Y. 1975). While the pre-trial delay may have lengthened the time period of deprivation of privileges due to the detainer, it cannot be overlooked that petitioner, as noted above, was partially responsible for that delay and procrastinated for almost seventeen months before asserting his speedy trial rights.

Having weighed all the above factors surrounding the delay in petitioner's trial, I find no constitutional violation entitling him to a writ of habeas corpus. To the extent that a liberal reading of the petition reflects a speedy trial violation under the IAD, it is also rejected under *Edwards* v. *United States*, discussed *supra*.[1] And finally, petitioner's complaint that he was entitled under the New York Criminal Procedure Law to a hearing before the trial court on his speedy trial claim is rejected as raising a violation of state law not cognizable under § 2254.

I have considered all of petitioner's arguments and find them to be uniformly without merit. The writ of habeas corpus is denied and the petition is dismissed. Any application for leave to proceed in forma pauperis or for a certificate of probable cause will be denied.

So Ordered.

Dated: New York, New York,
July 24, 1978.

Henry F. Dwerker
U.S.D.J.

Appendix A

NOTES

1. § 2254(b) provides:

> (b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

2. § 2254(c) provides:

> (b) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

3. PX and RX will be used to refer to petitioner's exhibit and respondent's exhibit respectively.

4. The IAD is an interstate compact which provides a method for a prisoner, incarcerated in one jurisdiction with criminal charges pending against him in another jurisdiction, to request final disposition of the pending charges. It has been described by one law review note writer as "designed to ameliorate the once debilitating plight of prisoners against whom detainers had been filed, by establishing cooperative and expeditious procedures to bring about a final disposition of the pending charges." Note, *The Effect of the Interstate Agreement On Detainers Upon Federal Prisoner Transfer*, 46 Fordham L. Rev. 492, 493 (1977) (footnote omitted). An examination of the IAD's background and legislative history is contained in *United States* v. *Ford*, 550 F.2d 732 (2d Cir. 1977), *aff'd*, 46 U.S.L.W. 4491 (May 23, 1978).

   New York and the United States are both signatories to the IAD, which is contained in N. Y. Crim. Proc. L. § 580.20 (McKinney 1971) and 18 U.S.C.A. Appendix at 230-38 (Supp. 1977). New York and the United States became parties to the IAD in 1957 and 1970, respectively.

5. Contrary to petitioner's present assertion that prior to September 13, 1974 he was produced on more than one occasion from federal custody in Manhattan and transferred to state custody in Manhattan for pre-trial proceedings on the state indictment, petitioner explicitly stated on the record in state supreme court on September 13, 1974 that he had only

appeared in state court once before. RX-10 at 6. From the record before the court, this prior date appears to be July 24, 1974. To the extent that petitioner now conclusorily asserts further apperances which are unsubstantiated in the record, the court declines to address them.

6. Petitioner appears to rely on Article IV of the IAD which is applicable when a prosecutor desires to obtain custody of the prisoner and activates the IAD by filing a request for custody with authorities in the confining state. A parallel provision in Article III of the IAD states that the prisoner may activate the IAD's terms by filing written notice of place of imprisonment and a request for final disposition of the indictment. After transfer to the prosecuting jurisdiction, if trial is not had and the prisoner is instead returned to the jurisdiction of confinement, "such indictment, information or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice." Art. III(d). In the present situation both Articles III(d) and IV(e) appear applicable. On September 20, 1974 the state prosecution requested temporary custody of petitioner for December 10, 1974 from federal authorities. See RX-11 & 12. Thereafter, petitioner, on October 21, 1974, signed a request for final disposition of charges pursuant to Article III. See RX-13. It is unnecessary to dwell upon this point, however, since the result is the same under either article.

7. It should also be noted that aside from the reasons stated in *Edwards* v. *United States, supra,* as to why a violation of the IAD is not a basis for habeas corpus relief, there was clearly no IAD speedy trial violation stemming from petitioner's production in state court on December 11, 1974. Article III(a) provides that a prisoner requesting final disposition of pending charges in another jurisdiction must be tried within 180 days of his demand. Here, petitioner demanded a trial on October 21, 1974. The trial commenced March 5, 1975, clearly within the 180 day restriction. Article IV(e) provides that if a prosecutor requests custody of the prisoner, he must be tried within 120 days of his arrival in the receiving jurisdiction. Here the prosecutor requested that petitioner be transferred from federal to state custody on December 9, 1974. Since the trial began on March 5, 1975, the 120 day limitation was satisfied.

Appendix A

APPEARANCES

Petitioner *Pro Se*
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APPENDIX B

Opinion, United States Court of Appeals.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 246—September Term, 1980

(Argued October 2, 1980 Decided February 18, 1981)

Docket No. 80-2168

JOSE RIVERA, a/k/a ARAMIS FERNANDEZ,

Petitioner-Appellant,

—v.—

DAVID R. HARRIS, Superintendent,
Green Haven Correctional Facility,

Respondent-Appellee.

Before:

OAKES and NEWMAN, *Circuit Judges,* and COFFRIN,* *District Judge.*

Appeal from a judgment of the District Court for the Southern District of New York (Henry F. Werker, Judge), dismissing a state prisoner's habeas corpus challenge to his conviction, which had alleged denial of due process due to inconsistent bench trial verdicts.

Reversed and remanded.

* The Honorable Albert W. Coffrin of the United States District Court for the District of Vermont, sitting by designation.

LINDA FRASER, New York, N.Y. (Fisher & Fraser, New York, N.Y., on the brief), *for Appellant.*

CLEMENT H. BERNE, Asst. Atty. Gen., New York, N.Y. (Robert Abrams, Atty. Gen. of the State of New York, George D. Zuckerman, Asst. Sol. Gen., on the brief), *for Appellee.*

NEWMAN, *Circuit Judge:*

This appeal from an unsuccessful habeas corpus challenge to a state court conviction raises interesting issues concerning the constitutionality of inconsistent verdicts rendered by a judge in a multi-defendant criminal trial without a reasoned explanation of the basis for the disparate results. Petitioner-appellant Jose Rivera and two co-defendants, Cynthia Humdy and Earl Robinson, were tried on charges of robbery and related offenses by a Justice of the Supreme Court of the State of New York sitting without a jury. The Court rendered general verdicts acquitting Robinson on all charges but convicting petitioner and Humdy. Petitioner contends that his conviction offends the Constitution because it cannot rationally be reconciled with Robinson's acquittal. We agree with petitioner that the trial court, in acquitting his co-defendant, appears to have rejected the only evidence that would sustain petitioner's conviction. However, we cannot be certain that this happened and therefore do not reach the question whether the Constitution would prohibit a trial court from rendering verdicts that are inconsistent as between co-defendants. We do conclude, however, that when verdicts in a non-jury trial are facially inconsistent,

the Due Process Clause of the Fourteenth Amendment does not permit a conviction to stand unless the trial court demonstrates by appropriate findings that the conviction validly rests on a rational basis.

I.

Petitioner and his two co-defendants were indicted for robbery in the first degree, robbery in the second degree, possession of a dangerous weapon, grand larceny in the third degree, and burglary in the second degree. All the charges were based on an episode alleged to have occurred at the apartment of Milagros Torres on March 26, 1973. The defendants pled not guilty to all charges, waived their rights to a jury trial, and proceeded to trial before a Justice of the Supreme Court.

The prosecution and defense evidence revealed a sharp dispute as to whether any of the alleged crimes had been committed. The State offered evidence to show that the three defendants, acting in concert and armed with a dangerous weapon, forcibly entered Ms. Torres' apartment and robbed her of $540. The defendants offered evidence to show that Torres was not the innocent victim of a robbery committed by three strangers, but that she was in the numbers business and that petitioner, along with the co-defendants, had been admitted to her apartment where petitioner collected his $540 winnings on a numbers bet. In order to consider petitioner's claim that his conviction cannot rationally be reconciled with Robinson's acquittal, the evidence must be examined in some detail.

The only witness for the State who testified concerning the means by which the defendants gained entry to the complainant's apartment and their actions inside

the apartment was the complainant herself, Ms. Torres. She testified that on the morning of the day in question she heard noises in the hallway outside her apartment. Looking through the peephole in the door, she saw a woman, identified as defendant Humdy, dressed like a nurse. She asked the woman who she was, and the woman held up a yellow slip of paper and announced that she was investigating a matter concerning a vacination. Torres opened the door to the extent that the chain lock would permit in order to take the slip of paper. As soon as the door was opened, a man, identified as petitioner Rivera, placed his foot in the opening, brandished a handgun, and told her to open the door. She screamed and tried to close the door but another man, identified as defendant Robinson, forced the door open, breaking the safety chain. Petitioner and Robinson then dragged her to the bedroom, where Robinson handcuffed her and placed tape over her mouth and eyes. Shortly thereafter, she heard a "commotion" in the apartment. Petitioner then removed the handcuffs and tape and warned her "not to accuse them" when the police came into the apartment. At that point, the police entered and, despite the warning, she told them what she claimed had occurred.

Torres' neighbor, Robert Parilla, also testified for the State. He stated that on the morning of the day in question he heard a woman scream. He went to the door of his apartment and attempted to look through the peephole into the hallway, but something had been placed over the opening on the other side of his door. He then peered under his door and saw two pairs of men's shoes. Suspecting that something was wrong, he telephoned the police. The police arrived, and he informed them of what he had heard. The officers knocked on Torres' door, identified themselves, and asked if everything was all

right. A woman who sounded like Torres replied from inside the apartment that she was taking a shower. While the officers and Parilla were standing at Torres' door, Torres' friend, Erminda Gonzales, arrived at the apartment and informed the officers that her friend lived inside. One of the officers knocked again and ordered that the door be opened so that he could verify that everything was all right. The woman inside the apartment replied that she could not open the door because she was undressed. When Gonzales heard the woman's reply, Gonzales screamed, "You're not Milagros. You're a mugger." The woman inside the apartment replied that she was Torres' friend. The officers repeated their order to open the door. At that point Parilla returned to his apartment. As he entered, he saw through his window a woman in a nurse's uniform (Humdy) on the fire escape adjoining the two apartments. One of the officers apprehended Humdy and escorted her to the hallway. The door to Torres's apartment then opened, and petitioner and Robinson emerged. As the three intruders were being led away, Parilla overheard one of the men warn Torres not to talk to the officers.

Gonzales and two of the arresting officers provided additional details. All testified that when they first observed Torres inside the apartment, she appeared upset and frightened. Clothing was on the floor, and some furniture had been overturned. The officers did not search the apartment, but they did observe a large amount of cash and several pieces of expensive jewelry in the bathtub, a fully loaded and operable automatic pistol on the living room floor, and two pairs of handcuffs and a key in the bedroom. One of the officers testified that he found $540 in a large roll in Humdy's pocket, which Torres subsequently identified as cash that she had been keeping in her apartment.

The defendants' version of the events was presented by Robinson, the only defense witness. He testified that on the morning of the day in question petitioner visited him at his apartment. Petitioner told him that he was driving downtown to take Humdy, petitioner's wife, to beautician school. Robinson requested a ride to work, and petitioner agreed, but said that he had to make a stop to collect his winnings on a numbers bet. When the three arrived at Torres' apartment, Torres answered the door and asked petitioner what he wanted. Petitioner told her that he had "a hit for Saturday," and Torres told him to come in so that she could "check the work." Torres invited Robinson and Humdy to sit in the living room and went into the kitchen with petitioner. Robinson overheard Torres and petitioner arguing loudly about whether petitioner had a "hit." During the argument there was a knock at the door. Torres asked who was there, and a voice answered, "Police. What's going on in there?" Torres replied, "Nothing," and then ran to the kitchen, grabbed some cash and numbers slips, and ran to the bathroom. Robinson heard the toilet flushing as the police knocked again at the door. Torres went to the door and told the police that she would open it as soon as she was dressed. She then ran again from the kitchen to the bathroom, where she flushed more numbers slips down the toilet.

After hiding her electric calculator under the bed, Torres ordered Robinson, petitioner, and Humdy to climb out the window to the fire escape. Humdy did so, but Robinson and petitioner refused. Robinson then announced that he was going to open the door and did so. The officers offered Robinson and petitioner into the hallway, where Humdy already had been taken into custody. Torres told the officers that it was "just an argument among friends," and the officers told the three to

leave. As they started to leave, Gonzales emerged from Parilla's apartment and spoke to Torres in Spanish. One of the officers then accompanied Torres and Gonzales into Torres' apartment. Moments later, the officer emerged and ordered the three placed under arrest. Petitioner implored "Millie" (Torres) to tell the officer the truth, but she remained silent. After the three were taken from the building, petitioner and Robinson explained to the officers that Torres was operating a policy parlor and that petitioner had come to the apartment to collect his winnings on a bet.

In their closing arguments all counsel agreed that the outcome of all three cases depended on whether the Court believed Torres or Robinson. The Assistant District Attorney argued that Robinson had told "a story which is merely the evasion of a man that committed a crime, who is trying to avoid the consequences of that act." Counsel for the defendants argued that Torres' version of the incident was cast in doubt by discrepancies in the record. They noted that although the indictment charged the defendants with robbery and related offenses, the original complaint, signed by Torres, had alleged only the far less serious offense of menacing. Torres had testified before the grand jury that she saw petitioner hide the handgun in a living room chair, and it was undisputed that he had ample time after the police arrived to hide any incriminating evidence, yet one of the officers had testified that he discovered the handgun lying in plain view on the living room floor. The officers had testified that they recovered a large amount of cash and jewelry from the bathtub, which they took to the stationhouse and then returned to Torres, yet the only property the officers "vouchered" at the stationhouse was the $540 found in Humdy's pocket. Defense counsel argued that Torres' version was cast in

further doubt by the absence of corroborating evidence. Torres had testified that the defendants gained entry to her apartment by breaking the chain lock on the door, yet none of the State's other witnesses recalled any sign of forcible entry. Moreover, although Torres had testified that Robinson placed tape over her mouth and eyes, no tape was found in or around the apartment or in the possession of the defendants.

Finally, defense counsel focused on two points that directly supported Robinson's claim that Torres was in the numbers business. The first point concerned Torres' personal finances. Torres had testified that at the time of the incident she was working as a night supervisor at a laundry, that this was her sole source of income, and that she was earning between $75 and $95 per week, yet she also had testified that she vacationed for three weeks each year in such places as Puerto Rico, South America, and Europe, that she owned a new car, and that she had installed a wall safe in her apartment to protect her valuables. The second point, judicially noticed by the trial court, was that the $540 found in Humdy's pocket equals the winnings on a $1 numbers bet, $600, discounted by the customary 10% runner's fee. Defense counsel argued that this extraordinary coincidence was sufficient to create a reasonable doubt about the defendants' guilt.

The trial judge entered only general findings on each of the charges. All three defendants were found not guilty of robbery in the first degree and not guilty of possession of a dangerous weapon. The trial judge found petitioner and Humdy guilty of robbery in the second degree and grand larceny in the third degree,[1] but acquitted Robinson on

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[1] The grand larceny count was dismissed at sentencing as a lesser included count within robbery in the second degree.

these counts, stating only that he had a reasonable doubt as to Robinson's guilt. Finally, the trial judge found all three not guilty of burglary in the second degree, but found petitioner and Humdy guilty of the lesser included offense of burglary in the third degree.

Prior to sentencing, Humdy moved for judgment withstanding the verdicts or for a new trial, contending that the verdicts convicting her and petitioner could not be reconciled with Robinson's acquittal. This motion was summarily denied. Petitioner was then sentenced on the robbery and burglary counts to concurrent terms of imprisonment of five to fifteen years, and seven years, respectively, to be served consecutively to a previously imposed, unrelated federal sentence of five years.

On direct appeal petitioner renewed the argument that the verdicts acquitting Robinson but convicting him were "reversibly inconsistent and irrational." In support of this argument his counsel cited New York case law concerning inconsistent verdicts in criminal cases. In a separate brief filed *pro se*, petitioner argued that he had been "denied of the right to the equal protection of the law and due process when the trial court inexplicably choosed to acquit one of the defendants, who was similarly situated under the same circumstances as appellant and the other co-defendant, and opted to sentence only appellant and the other co-defendant." Petitioner contended that the only possible explanation for the disparity in the verdicts was that the trial judge had been prejudiced against him.

The Appellate Division affirmed without opinion, 57 A.D.2d 737, 393 N.Y.S.2d 630 (1977), and leave to appeal to the Court of Appeals was denied, 42 N.Y.2d 890 (1977). Petitioner then filed the instant habeas corpus petition *pro se*, contending, among other things, that his guilt had not been proven beyond a reasonable doubt, and repeating his claim that the inconsistent verdicts were

"constitutionally defective." The District Court for the Southern District of New York (Henry F. Werker, Judge) denied the insufficiency claim under the then prevailing "no evidence" standard, *Thompson v. Louisville*, 362 U.S. 199 (1960), because the trial record contained ample evidence, which, if credited, established petitioner's guilt. The Court then rejected the inconsistency claim on the ground that it was merely a "variation" of the insufficiency claim. We issued a certificate of probable cause allowing petitioner an opportunity to appeal the District Court's judgment.[2]

II.

Petitioner's argument in this Court that his conviction is "irrationally inconsistent" with his co-defendant's acquittal is based on Judge Friendly's opinion for a divided panel in *United States v. Maybury*, 274 F.2d 899 (2d Cir. 1960). Maybury was indicted for forging the endorsement on a United States Treasury check and for uttering the check knowing that the endorsement had been forged. He was tried before the District Court without a jury. The check in question displayed three endorsements: "Abraham Kroll," the payee; "William Maybury," the defendant; and "William Kozin," the person who had cashed

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2 Petitioner's appeal challenges the District Court's denial of all the claims raised in the petition. The insufficiency of the evidence claim, which is analytically distinct from the inconsistency claim, is without merit, even under the test of *Jackson v. Virginia*, 443 U.S. 307, 319 (1979), because the evidence, viewed in a light most favorable to the State, was sufficient to permit a rational trier of fact to find that the essential elements of the offenses had been proven beyond a reasonable doubt. A claim based on the Interstate Detainers Act is not cognizable in this habeas proceeding. *See Edwards v. United States*, 564 F.2d 652, 653-54 (2d Cir. 1977).

the check. Maybury's defense was that a person known to him as Barney had asked him to endorse the check and that he had done so in the belief that Barney, "who could not write too good," was the rightful payee. The District Court acquitted Maybury of forgery but convicted him of uttering the check knowing it to be forged. On appeal Maybury urged that his conviction on the uttering count was inconsistent with his acquittal on the forgery count. The Court agreed that there was "no rational basis on which the trial judge, if not convinced beyond a reasonable doubt that Maybury had forged the endorsement, could be convinced beyond a reasonable doubt that he had uttered or published the check knowing it to be forged." *Id.* at 904. The Court recognized that under *Dunn v. United States*, 284 U.S. 390, 393 (1932), inconsistency in a *jury's* disposition of criminal charges is of no legal significance. It also recognized, however, that the *Dunn* rule rests on considerations relating to the special nature and function of the jury. The value of a jury as a collective voice of the citizenry and the difficulty of securing unanimity have been thought to justify toleration of a jury's acquittal on some counts as an exercise of leniency or even an acquittal on all counts "in the teeth of both the law and the facts," *Horning v. District of Columbia*, 254 U.S. 135, 138 (1920) (Holmes, J.). *See* 274 F.2d at 902-03. These considerations could not justify the disparity in the *Maybury* verdicts because the defendant had been tried by a judge. A judge is not the "voice of the country," and there is no need to permit inconsistency in his disposition of criminal charges so that he can reach unanimity with himself. *Id.* at 903. The Court did not believe that "[it] would enhance respect for the law or for the courts by recognizing for a judge the same right to indulge in 'vagaries' in the disposition of criminal charges

that, for historic reasons, had been granted the jury." *Ibid.* It therefore reversed for inconsistency, "not because of any desire for *elegantia juris,* but because [it could] have no confidence in a judgment convicting Maybury of one crime when the judge, by his acquittal of another, appear[ed] to have rejected the only evidence that would support the conviction." *Id.* at 905.

The *Maybury* rule barring inconsistent verdicts in federal criminal bench trials is well established in this Circuit. *See, e.g., United States v. Wilson,* 342 F.2d 43 (2d Cir. 1965); *United States v. Sells,* 325 F.2d 161 (2d Cir. 1963); *United States v. Zambardi,* 276 F.2d 169 (2d Cir.), *cert. denied,* 364 U.S. 842 (1960). To our knowledge, however, this is the first time that a habeas applicant has asked us to overturn a state conviction on the basis of the *Maybury* rule. The State argues that petitioner is not entitled to relief because the trial court's verdicts are in fact not inconsistent and because the *Maybury* rule against inconsistent bench verdicts is not of constitutional dimension. We consider these contentions in turn.[3]

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[3] The State argues that petitioner is not entitled to relief for the further reason that he has failed to exhaust his state remedies. The State asserts that the inconsistency claim petitioner presented to the state courts was based solely on New York case law. As noted in the text, however, the record of the proceedings before the Appellate Division shows that, although petitioner's counsel may have relied in his brief solely on New York case law, petitioner's *pro se* brief expressly invoked the Due Process and Equal Protection Clauses of the Fourteenth Amendment. We know of no New York procedural rule that would have entitled the Appellate Division to disregard petitioner's *pro se* submission, and, so far as we can tell, that submission was accepted and made a part of the record on appeal. Accordingly, we have no difficulty concluding that the exhaustion requirement has been fully satisfied.

Appendix B

A.

The State's contention that the verdicts convicting petitioner and acquitting Robinson are not inconsistent rests primarily on the assertion that the evidence in their jointly tried cases was not identical. The State relies on the fact that Robinson testified and petitioner did not. Presumably the State is not relying on any adverse inference from petitioner's failure to testify, and there is no explicit claim that Robinson's testimony at the joint trial was not admissible in petitioner's case.[4] The State's point appears to be that the *credible* evidence against each defendant was not identical, on the theory that Torres' testimony could have been found credible only to the extent that she implicated petitioner and Humdy, and that Robinson's testimony could have been found credible only to the extent that he denied his own guilt.

We begin our assessment of whether the verdicts are inconsistent by considering the appropriate test of inconsistency. Several courts, when considering challenges to allegedly inconsistent verdicts rendered by juries, have applied the test of identical evidence, and rejected challenges when the test was not precisely met. *See, e.g., People v. Taylor,* 25 Ill. App. 3d 396, 323 N.E.2d 388

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[4] In *United States v. Kahn,* 366 F.2d 259 (2d Cir.) *cert. denied,* 365 U.S. 948 (1966), the defendant contended that because he had rested and moved for acquittal at the close of the Government's case, the jury should have been instructed to consider as evidence against him only the evidence introduced by the Government in its direct case and not the subsequent testimony of his co-defendants. The Court rejected this argument, stating that it could see no reason why the jury should not have been free to consider the co-defendants' testimony. *Id.* at 263. We think it follows *a fortiori* that if a defendant in a joint trial is not entitled to have a co-defendant's testimony excluded from his case when it is inculpatory, he is entitled to have the benefit of it when it is exculpatory. The prosecution elected to have a joint trial of all three defendants.

(1974) (if there is any difference in the evidence, acquittal of one defendant not a ground for reversal of the conviction of the other); *People v. Newman,* 192 Cal. App. 2d 420, 13 Cal. Rptr. 305 (1961) (although inconsistent verdicts rendered on the basis of identical evidence requires reversal of conviction, slightest difference in the evidence permits appellate court to affirm); *People v. Scheppa,* 295 N.Y. 359, 67 N.E. 2d 581 (1946) (since the evidence against jointly-tried defendants was not identical, unnecessary to consider legal effect of a verdict that illogically discriminates between defendants as to whom the proofs were identical).

Strict adherence to the "identical evidence" test may be appropriate in considering a challenge to inconsistent *jury* verdicts because those verdicts represent the collective deliberative process of twelve individuals. The requirement of unanimity with respect to verdicts does not mean that all twelve jurors must be unanimous in their appraisal of each item of evidence. Moreover, the sanctity of the jurors' deliberative process would be imperiled by requiring explanation of each juror's individual decision-making. In light of these facts, it may be tolerable to accept jury verdicts that are facially inconsistent so long as the proofs against the defendants differ in any respect. The difference affords some basis for confidence in the verdicts, even though we remain unenlightened as to how each juror analyzed all the evidence in reaching seemingly inconsistent results.

Whatever the merit of that approach, it is not justified when facially inconsistent verdicts are returned by a trial judge. The single trier obviously applies a single analysis to each item of evidence, and if his analysis is irrationally inconsistent between two defendants, the convicted defendant has a substantial basis for contending that his verdict

is improper. Moreover, no values are served by foreclosing inquiry into the reasoning of a single trier of fact. Disclosure of the judge's reasoning can be expected to make clear whether the facially inconsistent verdicts are the product of some plausible explanation, or whether, because of faulty analysis, mistake, or reliance on some impermissible factor, the inconsistency may not validly stand.

We think it was these considerations that prompted this Court in *Maybury* and subsequent cases to eschew the identical evidence test of inconsistency and inquire not simply whether there was *any* difference between the evidence against the defendants whose verdicts appeared to be inconsistent, but whether, as stated in *Maybury*, the verdicts could be explained on any "rational basis." 274 F.2d at 904. In the first case that followed *Maybury* it was stated that "*Maybury* requires reversal when there is an inconsistent appraisal of the evidence necessary to sustain the count on which the defendant has been convicted." *United States v. Zambardi, supra*, 276 F.2d at 171 (Waterman, J., concurring). Applying *Maybury* in *United States v. Sells, supra*, the Court, in declining to reverse for inconsistency, noted that the evidence underlying the disparate verdicts was not identical. 325 F.2d at 162. But *Sells* did not rely simply on the existence of some difference in the proofs; instead, the Court, in keeping with the "rational basis" test, affirmed because the difference in the proofs against the defendants was sufficient "to justify the difference in result." *Id.* at 162. Our most recent formulation of *Maybury* requires a determination that the verdicts are not "wholly irreconcilable with any rational theory." *United States v. Rosengarten*, 357 F.2d 263, 267 (2d Cir. 1966), *quoting United States v. Wilson, supra*, 342 F.2d at 45. We continue to believe that a

rational basis test is the appropriate test of inconsistency when assessing verdicts rendered by a trial judge.

We therefore proceed to consider the State's contention that the evidence the trial judge may have credited with respect to Robinson and petitioner was not only different in some respects, but that the difference supplies a rational basis for explaining the verdicts. After examining the record in detail, we are unable to discern any plausible basis on which the trier might have credited only portions of Torres' and Robinson's testimony that would rationally explain the verdicts. Robinson figured as prominently in Torres' version of the incident as petitioner and Humdy; if anything, his conduct was the most aggressive. According to Torres, it was Robinson who forced open the door and enabled the defendants to gain entry to her apartment, and it was Robinson who handcuffed her and placed tape over her mouth and eyes. In accusing all three defendants, Torres was not any less certain of Robinson's role than that of the others, and there is not even a hint in the evidence that she had a motive to give false testimony only against Robinson. Similarly, in exonerating all three defendants, Robinson did not give a version of his role that endeavored to deny only *his* participation in criminal conduct or only *his* knowledge or criminal intent. His testimony was that all three defendants went to the apartment to collect petitioner's gambling winnings and that the crimes charged in the indictment were not committed. As all counsel recognized in their closing arguments, it was a matter of Torres' word against Robinson's. If Torres was telling the truth, all three were guilty. If Robinson was telling the truth, all three were not guilty.

The apparent illogic of petitioner's conviction and Robinson's acquittal is further illuminated by considering

the elements of the offenses for which petitioner stands convicted. The offense of robbery in the second degree requires a forcible stealing. N.Y. Penal Law § 160.10 (McKinney 1975). A person forcibly steals property when, in the course of committing a larceny, he uses or threatens the immediate use of physical force. N.Y. Penal Law § 160.00 (McKinney 1975). The only evidence of physical force was Torres' testimony that petitioner threatened her with a gun and that petitioner and Robinson then dragged her to the bedroom, where Robinson handcuffed her and placed tape over her mouth and eyes. She did not allege that any verbal threats were used. Petitioner's acquittal on the gun charge rejected Torres' testimony concerning the gun as a possible basis for a finding of forcible stealing, and Robinson's acquittal on all charges appears to constitute an implicit rejection by the trial court of Torres' testimony that the defendants used physical force. A person is guilty of burglary in the third degree when he knowingly enters or remains in a building unlawfully with intent to commit a crime. N.Y. Penal Law § 140.20 (McKinney 1975). An entry is unlawful if it is accomplished without license or privilege. *People v. Ennis*, 37 A.D.2d 573, 322 N.Y.S.2d 341, *aff'd*, 30 N.Y.2d 535, 330 N.Y.S.2d 384 (1971). The only evidence of unlawful entry was Torres' testimony that petitioner ordered her at gunpoint to open the door and that Robinson forced the door open. Here again, petitioner's acquittal on the gun count eliminates the former as a possible basis for a finding of unlawful entry, and the latter appears to be negated by Robinson's acquittal.

We therefore conclude that petitioner's conviction is at least facially inconsistent with Robinson's acquittal. The verdicts appear to be inconsistent because the record discloses no rational basis on which the trial court, if not

convinced beyond a reasonable doubt that Robinson was guilty, could have been convinced beyond a reasonable doubt that petitioner was guilty. We therefore turn to the issue of whether this unexplained inconsistency warrants relief under the Constitution.

B.

Petitioner's essential constitutional claim is that his liberty has been denied in violation of the Due Process Clause because his conviction, considered in light of Robinson's acquittal, does not rest on any rational basis.[5] Prior decisions do not provide a ready answer to this claim. The rule of *Dunn v. United States, supra,* rejecting challenges to inconsistent jury verdicts, does not determine the validity of a similar challenge to inconsistent verdicts rendered by a trial judge, as we noted in *Maybury.* But in prohibiting inconsistent bench trial verdicts, *Maybury* does not purport to rest on any provision of the Constitution and may well have been decided solely in the exercise of the Court's supervisory power over the administration of criminal justice within this Circuit. Several state court decisions have reversed inconsistent verdicts rendered by judges,[6] and New York courts have

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5 Petitioner also claims that his conviction denied him the equal protection of the laws. However, he makes no claim that he was convicted because of his membership in any identifiable class. The only validity to his equal protection claim would arise from a determination that his conviction is irrationally inconsistent with the acquittal of his co-defendant. That is the essence of his due process claim, which we examine in detail.

6 *See, e.g., People v. Beasley,* 41 Ill. App. 3d 550, 353 N.E.2d 699 (1976); *People v. Ethridge,* 131 Ill. App. 2d 351, 268 N.E.2d 260 (1971); *People v. Griffin,* 88 Ill. App. 2d 28, 232 N.E.2d 216 (1967). *See also Johnson v. State,* 238 Md. 528, 209 A.2d 765 (1965) (recognizing *Maybury* rule).

reversed inconsistent jury verdicts,[7] but none of these cases relies on standards of the Constitution.[8]

In our view the due process issue in this case has two components: the inconsistent verdicts and the absence of a reasoned explanation for the disparate results. The ultimate issue is whether a verdict of guilty offends the Due Process Clause when it is facially inconsistent with an acquittal rendered in a joint bench trial of multiple defendants. The answer to that question may well turn on the circumstance that prompted the differing verdicts. For example, it is possible that the trier noted some basis in the evidence concerning the alleged crimes, not apparent to those reviewing his bare conclusions, that affords a rational basis for reaching what seem to be inconsistent results. On the other hand, the explanation may lie not in analysis of the evidence about the crimes, but some other aspect of the case that is arguably or perhaps clearly insufficient to justify the conviction. For example, if a trier were to convict one defendant because he did not testify or because of some adverse fact known to the trier but not included in the evidence, constitu-

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7 *See People v. Munroe*, 190 N.Y. 435, 83 N.E. 476 (1908); *People v. Kramer*, 70 A.D.2d 888, 417 N.Y.S. 2d 97 (1979); *People v. Greenfield*, 70 A.D.2d 662, 416 N.Y.S. 2d 830 (1979); *People v. Safe-Way Coal Co.*, 242 A.D. 659, 272 N.Y.S. 658 (1934); *People v. Massett*, 55 Hun. 606, 7 N.Y.S. 839 (1889). A substantial number of courts have declined to follow the *Dunn* rule. *See* cases cited in Annotation, *Inconsistency of Criminal Verdicts as Between Two or More Defendants Tried Together*, 22 ALR 3d 717, 725 (1968); Annotation, *Inconsistency of Criminal Verdicts as Between Different Counts of Indictment or Information*, 18 ALR 3d 259, 281 (1968); Comment, 60 Col. L. Rev. 999, 1002-04 (1960).

8 The only case we have been able to find that expressly suggests that inconsistent verdicts might violate the Constitution is *People v. Scheppa, supra*, and the Court in that case expressly declined to rule on the issue because it found that the jury verdicts were not inconsistent.

tional infirmity would be apparent. A violation of fundamental fairness would be less certain, though the defendant would have a plausible basis for complaint, if the trier concluded that both defendants had committed the crimes charged, but declined to convict one of them in an exercise of clemency. While sympathy for an accused, even though arising from the evidence, is not a proper basis for an acquittal,[9] it is not certain that such an acquittal renders unconstitutional the conviction of a jointly tried co-defendant where the evidence of the criminal participation of both defendants is not significantly different.[10] The range of circumstances that might explain facially inconsistent verdicts, whether validly or invalidly, prompts us to confine our attention at this point to the preliminary due process issue raised by the trial judge's failure to articulate the basis for the verdicts he rendered.

The Supreme Court has recognized that the fundamental due process guarantee of a right to be heard may be impaired unless the decision-maker is required to state the reasons for his decision. *Goldberg v. Kelly*, 397 U.S. 254, 267, 271 (1970). The requirement of an explanation contributes to accuracy and fairness by promoting consideration of all the relevant factors and by enabling the parties and reviewing courts to ensure that no error has occurred. *See, e.g., Wolff v. McDonnell*, 418 U.S. 539, 565 (1974); *Dorzynski v. United States*, 418 U.S. 424, 455-56 (1974)

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9 The exercise of lenity in the determination of guilt or innocence is no more proper for a judge than it is for a jury. *United States v. Maybury*, 274 F.2d 899, 902-03 (2d Cir. 1960). *See generally United States v. Dougherty*, 473 F.2d 1113, 1130 (D.C. Cir. 1972).

10 *See United States v. Maybury, supra*, 274 F.2d at 908 (Hand, J., dissenting). *Cf. United States v. Reginelli*, 133 F.2d 595, 597 (3d Cir.) *cert. denied*, 318 U.S. 783 (1943); *People v. Smith*, 117 Cal. App. 530, 4 P.2d 268 (1931).

(Marshall, J., concurring in the judgment). "A Sphinx-like silence," on the other hand, "precludes anyone from knowing whether [the decision-maker] acted in error." *United States v. Brown*, 479 F.2d 1170, 1173 (2d Cir. 1973).

Rule 23(c) of the Federal Rules of Criminal Procedure requires a federal judge, upon request, to make findings of fact in a non-jury criminal trial, and we have repeatedly emphasized the desirability of special findings, even in the absence of a timely request. *United States v. Rivera*, 444 F.2d 136, 138 (2d Cir. 1971); *United States v. Jones*, 360 F.2d 92, 96 (2d Cir. 1966), *cert. denied*, 385 U.S. 1012 (1967); *United States v. Rosengarten, supra*, 357 F.2d at 266 n.4. The importance of findings as an aid to appellate review, *see United States v. Johnson*, 496 F.2d 1131, 1137 (5th Cir. 1974) *cert. denied*, 420 U.S. 972 (1975); *United States v. Brown*, 479 F.2d 1170, 1173 (2d Cir. 1973); *United States v. Livingston*, 459 F.2d 797, 798 (3d Cir. 1972) (*en banc*), has prompted several courts of appeals to require findings on specific issues in order to determine whether a conviction was validly obtained. *E.g., United States v. Conners*, 606 F.2d 269 (10th Cir. 1979); *United States v. Pinner*, 561 F.2d 1203 (5th Cir. 1977). *Cf. Mladinich v. United States*, 371 F.2d 940 (5th Cir. 1967).

The importance of findings as a procedural safeguard for minimizing error and reducing the danger of arbitrary action has also been widely recognized in non-criminal proceedings where less is at stake. Rule 52(a) of the Federal Rules of Civil Procedure requires findings of fact in all civil cases tried without a jury, and similar requirements have been adopted by statute in most states,[11]

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[11] *See* Advisory Committee Note to Fed. R. Civ. P. 52 (collecting state statutes).

including New York.[12] Moreover, it has been held with increasing frequency that due process requires government officials to provide an explanation for a wide range of adverse administrative actions.[13]

Despite these developments, we can find no case holding that special findings in a criminal case are constitutionally required, and the implicit premise of our suggestions to district judges that they make special findings even when not requested by defendants is that such findings are not constitutionally required, an anomaly explicitly noted by Judge Friendly in *United States v. Rosengarten, supra. Cf. Arizona v. Washington,* 434 U.S. 497, 516-17 (1978) (lack of explanation for mistrial order does not render it constitutionally defective if likely basis inferable from record). Because more is at stake in a criminal trial than in many of the proceedings in which an explanation by the decision-maker is now required, the lack of such a requirement for bench trial convictions resulting in prison terms remains as anomalous as Judge Friendly considered it in *Rosengarten.* However, we need not in this case pursue the broad inquiry whether reasons are required in the general run of criminal bench trials. The issue here is whether an explanation is required in the rare case where bench trial verdicts are facially inconsistent.

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12 N.Y. Civil Practice Law and Rules § 4213 (McKinney 1975).

13 *See Wolff v. McDonnell,* 418 U.S. 539 (1974) (prison discipline); *Gagnon v. Scarpelli,* 411 U.S. 778 (1973) (probation revocation); *Morrissey v. Brewer,* 408 U.S. 471, 489 (1972) (parole revocation); *Goldberg v. Kelly,* 397 U.S. 254, 271 (1970) (welfare benefits); *Dumschat v. Board of Pardons,* ___F.2d ___, slip op. 1959 (2d Cir.), *cert. granted,* 49 U.S.L.W. 3270 (Oct. 14, 1980) (pardon process); *Johnson v. Board of Parole,* 500 F.2d 925, 934 (1974), *vacated and remanded as moot sub nom. Regan v. Johnson,* 419 U.S. 1015 (1974) (parole release).

In considering this narrow issue, we find a very helpful analogy in the Supreme Court's resolution of the question whether upon a retrial following a successful appeal, a more severe sentence may be imposed than the one imposed after the initial trial. In *North Carolina v. Pearce*, 395 U.S. 711 (1969), the Court concluded that such situations pose a distinct risk that the more severe sentence may have been improperly motivated by a desire to deter the exercise of appellate rights. The Court ruled that the only valid reason for enhanced sentencing would be conduct of the defendant occurring after the initial sentencing. Then, significantly to our case, the Court ruled that, even though the Constitution normally does not require sentences to be explained, *Williams v. Oklahoma*, 358 U.S. 576 (1959); *Williams v. New York*, 337 U.S. 241 (1949), the reasons for enhanced sentencing upon retrial must "affirmatively appear." *Id.* at 726. Petitioner's case is similar to *Pearce* in that it involves action by a state judge that may well be invalid, yet might be shown to be valid if adequately explained.[14] We think due process requires an explanation for such action.

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[14] There is a latent ambiguity in the Court's opinion in *Pearce*, which merits some consideration. The rule that the Court announced for future case requires the judge imposing the more severe sentence after retrial to state his own reasons on the record. The "factual data" on which the increased sentence is based must be part of the record, and the "reasons" for the judge's imposition of the increased sentence must "affirmatively appear." 395 U.S. at 726. These two requirements preclude simply inferring from the factual data what the reasons might have been. However, in affirming the decision of the federal habeas judge who had invalidated the increased sentence imposed on Pearce, the Court noted that "the State" had not "offered any reason or justification" for the increased sentence, 395 U.S. at 726, suggesting that, at least in Pearce's case, the *State's* articulation of a valid reason for the sentence might have sufficed, without the assurance that the proferred reason was actually entertained by the sentencing judge. To whatever extent the opinion pursues both these approaches, we think it clear that the prospective rule, requiring the sentencing judge to give

Our conclusion is confirmed by application of the prevailing test of due process requirements. The test requires considerations of three factors: (1) the private interest involved; (2) the risk of an erroneous deprivation of that interest under existing procedures, and the probable value of additional safeguards; and (3) the government's interest in maintaining the existing procedures. *See Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). Petitioner's liberty interest obviously is among the fundamental interests protected by the Due Process Clause. In the absence of an explanation for the trial judge's verdicts, there is an unacceptable risk that petitioner may have been convicted on some basis that lacks validity, and a requirement of appropriate findings will dispel any uncertainty about whether the conviction is valid. Findings are as needed here to explain the conviction as they were in *Pearce* to explain the sentence. Finally, we can think of no state interest that would be significantly impaired by a requirement of a reasoned explanation in this setting. Any objection concerning additional time and expense is insubstantial. The trial court's burden of explaining the basis of facially inconsistent verdicts will arise only infrequently and will be less burdensome than litigation aimed at determining what was in the trial court's mind. *See Arizona v. Washington, supra*, 434 U.S. at 516-17 (Marshall, J., and Brennan, J., dissenting).

Considering the need for and the benefit of a reasoned explanation by the trial court in this case and the trifling burden that such a requirement would entail, failure to insist on an explanation could be justified, if at all, only

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his reason for the more severe sentence, is the core of the Court's decision. In any event, in this case we have considered the State's proferred explanation for the facially inconsistent verdicts and found them unpersuasive.

by considerations of federalism and comity. The co-equal responsibilities of state and federal courts in the administration of federal constitutional law are such that a federal court ordinarily assumes that a state conviction rests upon correct fact-finding, 28 U.S.C. § 2254(d), and correct application of law to the facts. *Townsend v. Sain*, 372 U.S. 293, 314-15 (1963). This presumption of regularity is overcome, however, when there is reason to believe that the conviction is improper.[15] *Ibid.* In that event the federal court may independently examine the record to determine whether the unexplained action of the state court comports with the Constitution, sustaining it if it does, as in *Arizona v. Washington, supra*, or vacating it if it does not, as in *North Carolina v. Pearce, supra*, or affording the state court an opportunity to demonstrate the validity of its action, as in *Sigler v. Parker*, 396 U.S. 482 (1970); *Jackson v. Denno*, 378 U.S. 368, 391-93 (1964); and *Patterson v. Lockhart*, 513 F.2d 579 (8th Cir. 1975).

We conclude that this last approach is appropriate in this case, primarily because the verdicts, though facially inconsistent, may yet be susceptible to a rational explanation. If the trial court is able to demonstrate that the verdicts are not irrationally inconsistent, the ultimate issue of whether an inconsistent conviction offends the Due Process Clause need not be faced. In the circumstances presented by this unusual case, a "remand" to the

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[15] To the extent that the Supreme Court's recent decision in *Sumner v. Mata*, ___ U.S. ___, 49 U.S.L.W. 4133 (Jan. 21, 1981), would require a federal court in a case such as this to identify a subsection of 28 U.S.C. § 2254(d) that permits a grant of relief, we note that our holding that the trial court's failure to explain the basis for its disparate verdicts denied the petitioner due process of law is plainly within the scope of subsection (7).

state court is the preferable course. *See Sigler v. Parker, supra.*

For the foregoing reasons we reverse the District Court's judgment and remand with directions to enter an order conditionally vacating petitioner's conviction and awarding him a new trial unless the state trial court demonstrates by appropriate findings rendered within ninety days that petitioner's conviction is valid. If the state trial court makes findings purporting to demonstrate the validity of the conviction, petitioner may return to the District Court and renew his habeas corpus challenge to his conviction.[16] At that point, the issue will be whether the state court conviction, considered in light of the acquittal of petitioner's co-defendant and in light of the state trial court's findings, denies petitioner his liberty without due process of law. At this point, we hold only that facially inconsistent verdicts as to two defendants, rendered in a state court non-jury trial, deny the convicted defendant due process of law in the absence of any explanation for the apparent inconsistency.

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16 If the state trial judge is able to furnish findings purporting to account for the facial inconsistency between the verdicts, the state courts will not have had an opportunity to determine the validity of the proferred explanation. As a result, it could be argued that the exhaustion requirement of 28 U.S.C. § 2254(d) would then have to be met before any further challenge. However, the petitioner has presented to the state courts his basic contention that the facial inconsistency between his conviction and Robinson's acquittal denies him his liberty without due process of law. Having afforded the state courts an opportunity to consider that claim, petitioner need not pursue state court remedies a second time, simply because the trial judge supplies findings to explain the apparent inconsistency. Of course, petitioner is not precluded from seeking state court relief after the findings have been made, particularly if he determines that these findings reveal a defect cognizable under state, but not federal, law.

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CLERK

No. 81-17

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

DAVID R. HARRIS, Superintendent, Green Haven Correctional Facility,

Petitioner,

—*v.*—

JOSE RIVERA,

Respondent.

ON A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR JOSE RIVERA IN OPPOSITION

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OPINIONS BELOW

The opinion of the district court (Pet. App. A)[1] is not reported. The opinion of the court of appeals (Pet. App. B) is reported at 643 F.2d 86.

[1] "Pet. App." refers to the appendix to the petition.

JURISDICTION

The opinion of the court of appeals was dated February 18, 1981. A timely petition for rehearing with suggestion for a rehearing en banc was denied on April 21, 1981. Petitioner's motion to stay the mandate pending determination of the petition for a writ of certiorari was denied on May 12, 1981, effective May 25, 1981. The petition was filed on July 6, 1981. Petitioner's application for a stay was granted by this Court on July 16, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether Respondent's conviction lacks a rational basis.

2. Whether Federal habeas corpus jurisdiction authorizes a Federal court to direct a state court judge to explain irrational and logically irreconcilable verdicts.

STATEMENT

Respondent Jose Rivera, his wife Cynthia Humdy, and a friend Earl Robinson were indicted in 1973 for the crimes of robbery in the first degree, robbery in the second degree, burglary in the second degree, grand larceny in the third degree and criminal possession of a weapon, all in violation of New York Penal Law Sections 160.15, 160.10, 140.25, 155.30, and 265 et seq. The charges stemmed from an incident that took place on the morning of March 26, 1973, at the apartment of Milagros Torres, the victim of the alleged robbery. All three defendants waived their right to a jury, and proceeded to trial before a justice of the New York State Supreme Court.

Ms. Torres testified that she was the victim of an armed robbery perpetrated by the three defendants acting in concert. She stated that on the morning in question, she responded to a knock on her door and observed through the peephole a woman

dressed like a nurse, who held up a slip of paper and claimed to be investigating something concerning vaccination. Torres opened the door a few inches, leaving the chain lock attached, whereupon Rivera stepped up to the opening of the door, brandished a handgun, and ordered her to open the door. Torres screamed, and tried to close the door, but Robinson forced the door from the outside, breaking the chain lock. Rivera and Robinson dragged Torres to the bedroom. Robinson placed handcuffs on her, then taped her mouth and eyes. A short time later, she heard a commotion in the apartment. Rivera returned to her in the bedroom, removed the tape and handcuffs, and told her not to accuse them when the police arrived. Almost immediately thereafter, the police entered the apartment; Torres ignored Rivera's warning and told them what had just happened.

Torres' neighbor Robert Parilla testified that on that morning he heard a woman scream, and a man threaten to kill someone*. He attempted to look out into the hallway through the peephole of his door, but his vision was obstructed by something placed over the opening. He then looked under his door, observing two pairs of men's shoes. He placed a call to the police, and upon their arrival informed them of what he had seen and heard. The officers knocked on Torres' door, identified themselves, and asked whether everything was alright. A woman responded that she was taking a shower. While standing around in the hallway, Torres' friend Erminda Gonzalez arrived. In her presence, the officers knocked again, asking that the door be opened so that he could verify that everything was indeed all right. A woman replied from within that she could not open the door because she was undressed. Gonzalez told the police that that voice was not Torres'. They renewed their order that the door be opened. Sometime during all of this, Parilla returned to his apartment, seeing on the fire escape a woman wearing a nurse's uniform. He informed the police, and the woman (Humdy) was arrested and brought to the hallway. The door to Torres' apartment was finally opened from within, and Rivera and Robinson emerged.

Gonzalez and the arresting officers also testified, providing additional detail and circumstantial corroboration. Each testified

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* Torres remembered no such threat.

to the disarray of the apartment upon their entrance, with furniture overturned and clothing strewn about. Torres appeared frightened, was crying, and bore a red mark upon one cheek. The bathtub of the apartment contained a large amount of cash and several pieces of expensive jewelry*. A loaded and operable pistol was found on the living room floor. Two pairs of handcuffs and a key were found in the bedroom. Humdy possessed a roll of currency in her pocket totaling $540, subsequently identified by Torres as cash belonging to her daughter. The door to Torres' wall safe was ajar, and the safe empty. No tape was found in the apartment. The chain lock allegedly broken was neither noticed by the arresting officers, nor introduced into evidence at trial.

Earl Robinson, the only defense witness, testified that on the morning in question he asked Rivera to give him a ride to work. Rivera, who was taking Humdy to the beautician school where she was a student, agreed, but said that he first had to stop to collect his winnings on a number he had hit the previous weekend. The three went to Torres' apartment, where they were ushered in and asked to wait while she "checked the work." Robinson and Humdy waited in the living room, while Rivera accompanied Torres to the kitchen. Robinson stated that a loud argument ensued between Rivera and Torres. During this argument, there was a knock at the door. Torres emerged from the kitchen to ask who it was; a voice answered "Police" and asked what was going on. Torres replied, "Nothing," hurriedly gathered cash and policy slips and ran to the bathroom. Robinson recalled that he heard the toilet flushing as the police knocked once more on the door, Torres stated that she would open up as soon as she got dressed, then made another trip from the kitchen to the bathroom with money and numbers slips. Hiding her calculator under the bed, she instructed the three defendants to climb out onto the fire escape. Only Humdy complied; shortly thereafter Robinson announced that he was going to open the door, and did so. Rivera and Robinson walked into the hallway outside the front door, joining Humdy who, already under

* The officers testified that they took this property to the stationhouse, returning it to Torres several days later. The only property they vouchered was the $540 seized from Humdy.

arrest, had preceded them. Torres told the officers that there had simply been an argument among friends, and the three were told by the police to leave. Gonzalez spoke briefly to Torres in Spanish, then both were accompanied by the officers into Torres' apartment, from which the four emerged moments later. The three defendants, not having yet left, were immediately placed under arrest. Rivera beseeched Torres to "tell them the truth," but she said nothing. Once outside, Rivera told the officers that Torres was in the numbers business and that he had been at the apartment to collect on a hit.

In their summations, the trial counsel for both sides agreed on only one thing: that the verdicts hinged upon which of the witnesses were telling the truth. The Assistant District Attorney, citing the disarray of the apartment, the handcuffs in the bedroom, the handgun on the living room floor,the red marks on the victim's face, urged that the defendant's guilt was amply established. Defense counsel argued that their version of events was corroborated in several respects, and that of the People weakened by several evidentiary discrepancies. They argued that Torres' original complaint alleged only Menacing, a misdemeanor under New York law, while the indictment charged felonies. They pointed out that Torres told the Grand Jury that she saw Rivera hide his handgun in the living room chair, yet it was discovered in plain view on the living room floor. The broken chain lock was not produced. No tape was found in or around the apartment. Torres, a supervisor in a night laundry earning between $75 and $95 per week, took yearly vacations to South America and Europe, owned a new car, and had a wall safe installed in her apartment. The valuable contents of the bathtub, held by the police for several days, were neither counted nor vouchered. Finally, the trial court took judicial notice of the fact that $540, the amount found in Humdy's pocket, was the precise payoff on a $1 policy bet.

The trial judge entered general findings on each of the charges. Stating that he harbored reasonable doubt as to Robinson's guilt, he acquitted him on each count of the indictment. The judge found Rivera and Humdy not guilty of first degree robbery, second degree burglary and weapons possession. He

found them guilty of second degree robbery, third degree burglary and third degree grand larceny. Rivera was subsequently sentenced to concurrent terms of zero to seven years on the burglary count and five to fifteen years on the robbery count, both to be served consecutively to a prior unrelated federal term. The grand larceny count was dismissed at sentencing as necessarily included within the robbery count. The Appellate Division affirmed the conviction without opinion. The Court of Appeals denied leave to appeal. The United States District Court for the Southern District of New York denied Respondent's petition for a writ of habeas corpus. The United States Court of Appeals for the Second Circuit reversed the denial and "remanded" to the state court with instructions (Pet.App. B26). Rivera has been incarcerated in a state penal institution pursuant to these judgments since June 1, 1977.

ARGUMENT

1. Respondent's conviction lacks a rational basis because implicit in the trial judge's acquittal of Robinson and his findings with respect to the charges against Rivera and Humdy is his rejection of the very evidence necessary to sustain Rivera's conviction on the three counts he eventually was found guilty of. Under the applicable sections of New York penal statutes as applied to the facts of this case, the verdicts are a logical impossibility.

Respondent was acquitted of burglary in the second degree, but convicted of burglary in the third degree. Under N.Y. Penal Law §140.20, a person is guilty of burglary in the third degree when he "knowingly enters or remains unlawfully in a building with intent to commit a crime therein." Burglary in the second degree is simply burglary in the third degree with the presence of at least one of four aggravating elements listed in N.Y. Penal L. §140.25. Conviction of burglary in the second degree requires proof of burglary in the third degree, and proof that the defendant or another participant in the crime is armed with explosives or a deadly weapon, causes physical injury to a non-

participant in the crime, uses or threatens the immediate use of a dangerous instrument, or displays what appears to be a firearm. In acquitting respondent of burglary in the second degree, the trial judge necessarily rejected Torres' testimony concerning her physical injuries as well as her testimony that Respondent was armed.

With reference to the requirement of §140.20 that the entry be unlawful, the People were required to show that it was effectuated without license or privilege. *People v. Ennis*, 37 A.D.2d 573, 322 N.Y.S.2d 341, *affirmed*, 30 N.Y.2d 535, 330 N.Y.S.2d 384 (1971). However, the trial judge rejected the allegation that Respondent carried a gun; and by virtue of his acquittal of Robinson, also necessarily found that Robinson did not break open the door.

Robbery in the second degree requires, as a predicate, "forcible stealing." Forcible stealing is defined in N.Y. Penal Law §160.00 as the commission of a larceny involving the use or threatened use of physical force. The trial judge rejected the testimony that force was used or threatened—at least as to Robinson. Despite Torres' testimony that Rivera threatened her with a gun, all three defendants were acquitted of possession of a dangerous weapon. As for the alleged handcuffing and taping of the victim Torres, this was, according to her own testimony, committed by Robinson, who was acquitted on all charges.

The crucial issue at the trial was whether the $540 found in Humdy's pocket was taken from Torres by force or threat, or whether it was transferred through some other, non-criminal form of persuasion. The evidence supporting the allegation of a forcible taking was obviously sufficient. However the actual disposition of the various charges made by the trial judge was unfathomable. He rejected Torres' allegations that Rivera had a gun, that he threatened her, that Robinson broke down the door to get into the apartment, that she was handcuffed and taped—at least as to Robinson. As to Respondent, the judge had to credit at least some of the evidence he had just finished rejecting, for without evidence of force, a verdict of guilty of second degree robbery could not logically have been rendered.

As the Second Circuit correctly observed, the record discloses no basis upon which the trial court, if not convinced beyond a reasonable doubt as to the guilt of Robinson, could have been convinced that Rivera was guilty. The trial judge's simultaneous belief of Torres' testimony as to Respondent and rejection of that testimony as to his codefendant plainly denote the absence of a rational basis underlying the conviction.*

2. Petitioner erroneously contends that the court below gave constitutional dimension to consistency in non-jury verdicts as between codefendants (Pet. 7-9). In fact, the court expressly refrained from deciding whether the Constitution requires such consistency (Pet.App. B2). Rather, the court held that Respondent's conviction appeared to violate due process inasmuch as it appeared to lack a rational basis, and remanded to the state court for proceedings to determine whether in fact this was so. As the court correctly noted (Pet.App. B), a state criminal conviction which to the federal court appears to lack a rational basis has long been a ground for habeas corpus relief. 28 U.S.C. §2254(d)(7). The novelty of the decision lies solely within the fact that never before have logically irreconcilable bench-trial verdicts been claimed to warrant relief under the "due process" provision in 28 U.S.C. 2254. Perhaps this is so because never before have such incomprehensible verdicts been rendered in a state criminal conviction.

We do not question the propriety of the general rule that inconsistencies in a verdict do not affect the validity of a criminal conviction. *Hamling* v. *United States*, 418 U.S. 87, 100-01 (1974); *Dunn* v. *United States*, 284 U.S. 390 (1932). Yet even as to that rule exceptions exist, most notably 1) the inconsistent conviction of a conspirator whose alleged co-conspirators have been acquitted, *see Hartzel* v. *United States*, 322 U.S. 680, 682 n.3, (1944); but cf. *Standefer* v. *U.S.*,447 U.S. 10, 20 (1980) (aider and abettor may be convicted despite acquittal of princi-

* Not absolutely certain that this happened, the Second Circuit granted the writ conditionally, giving the state court 90 days to demonstrate by appropriate findings that the simultaneous acquittal and conviction was in fact based upon rational conclusions not apparent from the bare record of the trial. (Pet.App. B26.)

pal) (dictum); and 2) inconsistent multiple convictions, where the defendant could be guilty of either, but not both, charged offenses. See, *Villarreal Corro v. U.S.*, 516 F.2d 137, 141 (1st Cir. 1975); *United States v. Bethea*, 483 F.2d 1024, 1029-31 (4th Cir. 1973).

As the Second Circuit correctly concluded, the reasons for ascribing sanctity to a jury verdict have no application to a verdict rendered by a judge sitting as trier of fact. First, the judge's decision involves no element of collective deliberation and thus no element of compromise in his assessment of the evidence. Second, there is no need to defer to the privacy of the deliberative process or to the possibility that the jury is merely exercising its power to decide a case "in the teeth of both law and facts." *Horning v. District of Columbia*, 254 U.S. 135, 138 (1920).

There is thus no logical reason or necessity to allow a judge to reject certain evidence in acquitting one defendant, but then credit that same evidence in convicting another. As shown above, that is precisely what the judge in this case did. The Second Circuit's remand to the state court for an explanation of this apparent irrationality was eminently proper.

Petitioner incorrectly claims that two other circuits have ruled that consistent bench trial verdicts are not constitutionally required, citing *U.S. v. West*, 549 F.2d 454 (8th Cir.), cert. denied, 430 U.S. 956 (1977); *McElheny v. U.S.*, 146 F.2d 932 (9th Cir. 1944). In fact the Second Circuit's ruling in this case has now been expressly adopted by the Ninth Circuit, distinguishing *McElheny* on the ground, *inter alia*, that that decision failed to consider all the relevant factors. *US v. Duz-Mor Diagnostic Laboratory, Inc.*, 650 F.2d 223, 226 n. 2 (9th Cir. 1981). The Eighth Circuit's apparent disagreement is dictum, since the court there ruled that the verdicts before it were in fact consistent.

Contrary to Petitioner's assertion (Pet. p. 9), this Court's decision in *Jackson* v. *Virginia*, 443 U.S. 307 (1979) does not foreclose the factual inquiry and analysis engaged in by the lower court. In *Jackson*, this Court held that where the issue is

the *sufficiency* of the evidence underlying a criminal conviction, the reasoning process actually used by the trier of fact to reach the verdict is irrelevant to the habeas corpus court's inquiry, so long as there exists evidence which would permit a trier of fact to find guilt beyond a reasonable doubt. Inconsistency, however, is a different story. Where the verdicts as to co-defendants appear to be logically impossible, the fact that sufficient evidence is available fails to remove the due process violation inherent in the irrational conviction of one of them. In any event, the analysis conducted by the Second Circuit is frequently conducted by appellate courts in ruling upon similar claims. See, e.g., *Ashe v. Swenson*, 397 U.S. 436 (1970).

The Second Circuit thus correctly held that its habeas corpus jurisdiction authorized it to remand the case to the state court for explanation of the apparent irrationality underlying Respondent's conviction. *See*, e.g., *Sigler v. Parker*, 396 U.S. 482 (1970).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 81-17

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

DAVID R. HARRIS, Superintendent, Green Haven Correctional Facility,

Petitioner,

against

JOSE RIVERA, a/k/a ARAMIS FERNANDEZ,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY MEMORANDUM FOR PETITIONER

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One week after the petition for *certiorari* was docketed, the Ninth Circuit, citing the reasoning of the Second Circuit decision in the present case, remanded a direct federal appeal for an explanation of what the court found to be logically irreconcilable verdicts. *United States* v. *Duz-Mor Diagnostic Laboratory,* 650 F. 2d 223 (9th Cir. 1981). Thus, the Ninth Circuit has now ratified the Second Circuit's creation of a new constitutional guarantee by elevating the question of whether to prohibit logically inconsistent verdicts to one of fundamental fairness and by expanding the application of the doctrine from verdicts that

are logically inconsistent to those whose reasoning is not sufficiently obvious. This reliance upon the concededly novel holding below illustrates its direct impact upon all multi-count or multi-defendant state and federal criminal prosecutions and further demonstrates the need for plenary review by this Court.*

Respondent erroneously suggests that after *United States* v. *Duz-Mor Diagnostic Laboratory, supra,* there are no longer conflicting rulings on the question whether the Constitution requires the trial court to provide a written explanation of its verdicts under certain circumstances when the criminal defendant has waived his right to trial by jury (Brief in Opposition at 9). The *Duz-Mor* court, however, citing the holding of *United States* v. *West,* 549

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* *Duz-Mor,* unlike the present case, is an appeal from a *federal* criminal prosecution. While the court purported to base its holding upon the due process clause, like the court below, it examined the policies supporting the need for explanation of facially inconsistent verdicts from the viewpoint of sound judicial practice. Indeed, the court explicitly stated that whether or not consistency is constitutionally required, as a federal appellate court it could require the explanation in the exercise of its supervisory power. *Id.* 650 F. 2d at 226 and n. 2. In contrast, before a federal court will disturb a state court conviction, as was done by the court below, it must be established not merely that the trial court engaged in some "undesirable, erroneous, or even 'universally condemned' practice", but that it violated a right guaranteed by the Fourteenth Amendment to assure a fundamentally fair trial. *Cupp.* v. *Naughten,* 414 U.S. 141, 146 (1973).

Even if *Duz-Mor* were correctly decided, it does not follow that the decision below was correct. For in *Duz-Mor* the corporate defendant, but not "the only human agent representing the corporation in the challenged transaction," was convicted of Medicare fraud. *Id.,* 650 F.2d at 225. Thus, like *United States* v. *Maybury,* 274 F.2d 899 (2d Cir. 1960), but unlike *United States* v. *Wilson,* 342 F.2d 43 (2d Cir. 1965), the verdicts were logically irreconcilable. (See Petition, at 10-11.) In the present case, two defendants were convicted and one was acquitted on the basis of concededly different evidence. (See Brief in Opposition, at 3-5.) The only substantive question was whether this difference was sufficient to permit the verdict to stand.

F.2d 545, 553 (8th Cir.), *cert denied*, 430 U.S. 956 (1977), as an example, recognized that, "The other circuits do not agree on the effect of inconsistent 'verdicts' in bench trials." 650 F. 2d at 225. Respondent dismisses as dictum the refusal of the Eighth Circuit in *United States* v. *West, supra,* at 553, to impose a consistency requirement upon bench trial verdicts. But respondent's argument is of no relevance here, where the question is whether the courts in various circuits are operating under substantially different definitions of what constitutes a fundamentally fair trial.

The rights of criminal defendants in multi-count or multi-defendant actions are now notably different depending upon the circuit in which they are tried. The unconditional language in *United States* v. *West, supra,* informs the state courts within the Eighth Circuit that they need not make findings of fact after bench trials. In the present case, the Second Circuit has mandated such findings by state courts in New York, Connecticut and Vermont. By relying upon this decision, the Ninth Circuit in *Duz-Mor* suggests that it would impose the requirement upon state as well as federal trial courts. But because of the conflict between *Duz-Mor* and *McElheny* v. *United States,* 146 F. 2d 932 (9th Cir. 1944), and because those cases are direct federal appeals, the state courts within the Ninth Circuit are in a quandary. Given this confused and conflicting guidance, trial courts throughout the country require the conclusive interpretation of the Constitution that only this Court can provide.

Finally, the basis for the appearance of inconsistency set forth in the Brief in Opposition, at 7, is grounded upon a fundamental misunderstanding of the elements of third degree burglary (New York Penal Law § 140.20). Under the mistaken belief that to convict a defendant of this crime the trier of fact must find an unlawful entry, respondent is unable to reconcile what he presumes was the trial court's finding that the evidence did not establish such an entry

beyond a reasonable doubt and its further finding of guilt.* Under Penal Law § 140.20, however, a person is guilty of burglary in the third degree "when he knowingly enters or *remains* unlawfully in a building with intent to commit a crime therein." (emphasis added). Thus, when a person enters premises lawfully, but remains with the intent to commit a crime after permission to stay has been withdrawn, he is guilty of burglary in the third degree. Penal Law §§ 140.00(5), 140.20. See *People* v. *Licata*, 28 N Y 2d 113, 117 (1971). Accordingly, the trial court's determination that the evidence adduced at trial did not prove beyond a reasonable doubt that Robinson helped Rivera unlawfully enter the victim's apartment was not inconsistent with its determination that Rivera was guilty of burglary in the third degree.

Dated: New York, New York
September 14, 1981

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* The court below ignored the significance of circumstantial evidence of an unlawful entry—the blocking of the neighbor's peephole—which the trial court could have believed was done by Rivera and Humdy, without Robinson's knowledge. 643 F. 2d at 88 (Petition, App. B 4).